CONSTITUTIONAL LAW—FOURTEENTH AMENDMENT—PUBLIC SCHOOL MATERNITY LEAVE—*Cleveland Board of Education v. LaFleur*, 414 U.S. 632 (1974).

In late 1970, two Cleveland, Ohio public school teachers and one Chesterfield County, Virginia, public school teacher learned that they were pregnant and told their principals that they intended to teach until the end of the school term.[1] However, their principals informed them that school board rules required them to take a mandatory maternity leave without pay beginning at a cut-off date early in pregnancy[2] until at least the commencement of the school term following childbirth.[3] These rules resulted in enforced leaves lasting from six months to over a year and a half without pay. Neither school board contemplated that the pregnant teachers would return to their same classroom; the boards used permanent replacements, rather than temporary substitutes in the pregnant teachers' classrooms.[4] Furthermore, the Chesterfield County board dismissed teachers who did not take the Board's first offer of a position upon their return,[5] while the Cleveland board dismissed teachers who failed to follow the maternity rules.[6] The school teachers

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[1] Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 636, 638 (1974). LaFleur and Nelson expected their children in the summer of 1971; Cohen expected her child in April and asked to teach until April 1 or until the end of the first semester.

[2] The Cleveland rules required leave to be taken five months before the expected date of birth. *See* note 6 *infra*. The Chesterfield County rules set a leave date of four months before the expected date of birth. *See* note 5 *infra*.

[3] The Cleveland rules prohibited teachers from returning until the school semester beginning after the child reached three months of age This resulted in at least an eight month leave. *See* note 6 *infra*. The Chesterfield rule prohibited return until the beginning of the school year following childbirth. *See* note 5 *infra*.

[4] The school board policy suggests permanent replacements would be used. In actuality, Cleveland replaced LaFleur with a student intern in her special classes. *See* Respondent's Brief, Appendix, 74a, 54a. The Cleveland rules require two weeks notice before leave is taken, leaving little time for finding a suitable permanent replacement. *See* note 6 *infra*.

[5] The Chesterfield County rule provides:

MATERNITY PROVISIONS

a. Notice in writing must be given to the School Board at least six (6) months prior to the date of expected birth.

b. Termination of employment of an expectant mother shall become effective at least four (4) months prior to the expected birth of the child. Termination of employment may be extended if the superintendent receives written recommendations from the expectant mother's physician and her principal, and if the superintendent feels that an extension will be in the best interest of the pupils and school involved.

c. Maternity Leave

(1) Maternity leave must be requested in writing at the time of termination of employment.

(2) Maternity leave will be granted only to those persons who have a record of satisfactory performance.

(3) An individual will be declared eligible for re-employment when she submits written notice from her physician that she is physically fit for full-time employment and when she can give full assurance that care for the child will cause minimal interference with job responsibilities.

(4) Re-employment will be guaranteed no later than the first day of the school year following the date that the individual was declared eligible for re-employment.

414 U.S. at 637, n. 5.

[6] The Cleveland rule provides:

believed that the personal, financial, and professional burdens placed upon them by the mandatory leave policies deprived them of constitutionally protected rights; they subsequently filed suits in federal courts.[7]

The circuit courts found that the suits raised the question of whether the school boards' maternity leave rules constituted a violation of the equal protection clause of the fourteenth amendment.[8] The majority of the United States Supreme Court, however, found that certain provisions of the rules violated the due process clause of the fourteenth amendment.[9] The Supreme Court decision has been analyzed in terms of substantive due process.[10] This note will suggest, however, that the

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> Any married teacher who becomes pregnant and who desires to return to the employ of the Board at a future date may be granted a maternity leave of absence without pay.
> APPLICATION. A maternity leave of absence shall be effective not less than *five (5) months before the expected date* of the normal birth of the child. Application for such leave shall be forwarded to the Superintendent at least *two (2) weeks before the effective date of the leave of absence.* A leave of absence without pay shall be granted by the Superintendent for a period not to exceed *two (2) years.*
> REASSIGNMENT. A teacher may return to service from maternity leaves not earlier than the *beginning of the* regular school semester which follows the child's age of *three (3) months.* In unusual circumstances, exceptions to this requirement may be made by the Superintendent with the approval of the Board. *Written* request for return to service from maternity leave must reach the Superintendent at least six (6) weeks prior to the beginning of the semester when the teacher expects to resume teaching and shall be accompanied by a doctor's certificate stating the health and physical condition of the teacher. The Superintendent may require an additional physical examination.
> When a teacher qualifies to return from maternity leave, she shall have priority in reassignment to a vacancy for which she is qualified under her certificate, but she shall not have prior claim to the exact position she held before the leave of absence became effective.
> *A teacher's failure to follow the above rules for maternity leave of absence shall be construed as termination of contract or as grounds for dismissal.* (Emphasis in original.)

414 U.S. at 635, n. 1.

[7] LaFleur v. Cleveland Bd. of Educ., 326 F. Supp. 1208 (N.D. Ohio 1971); Cohen v. Chesterfield County School Bd., 326 F. Supp. 1159 (E.D. Va. 1971).

[8] LaFleur v. Cleveland Bd. of Educ., 465 F.2d 1184 (6th Cir. 1972); Cohen v. Chesterfield County School Bd., 474 F.2d 395 (4th Cir. 1973). *See* note 7 *supra* for district court opinions.

In addition, other courts had rendered decisions on maternity leave provisions, usually on equal protection grounds. *Compare* Green v. Waterford Bd. of Educ., 473 F.2d 629 (2d Cir. 1973) (invalidating mandatory leave rules for pregnant public school teachers) *with* Schattman v. Texas Employment Commission, 459 F.2d 32 (5th Cir. 1972) (upholding a leave policy of a state agency).

For opinions of the district courts dealing with mandatory maternity leaves, *see e.g.*, Heath v. Westerville Bd. of Educ., 345 F. Supp. 501 (S.D. Ohio 1972); Pocklington v. Duval County School Bd., 345 F. Supp. 163 (M.D. Fla. 1972); Bravo v. Bd. of Educ., 345 F. Supp. 155 (N.D. Ill. 1972); Williams v. San Francisco Unified School Dist., 340 F. Supp. 438 (N.D. Cal. 1972).

Cf. Gutierrez v. Laird, 346 F. Supp. 289 (D.D.C. 1972); Robinson v. Rand, 340 F. Supp. 37 (D. Colo. 1972) (all dealing with Air Force regulations requiring separation of pregnant personnel); Struck v. Secretary of Defense, 460 F.2d 1372 (9th Cir. 1971), *cert. granted*, 409 U.S. 947, *vacated and remanded to consider the issue of mootness*, 409 U.S. 1071 (1972).

[9] 414 U.S. 632 (1974).

[10] Nowak, *Realigning the Standards of Review Under the Equal Protection Guarantee—Prohibited, Neutral, and Permissive Classifications*, 62 GEO. L.J 1071, 1107 (1974) [hereinafter referred to as Nowak]: "Procedural language cannot disguise the fact that the Court re-

decision is based on procedural due process and that the safeguards afforded by that analysis fail to protect adequately the constitutional rights of the teachers. In addition, this note will examine the equal protection arguments presented to the Court and will suggest possible reasons that the Court did not discuss and apply them. The note concludes that the decision results in unequal treatment for pregnant teachers compared to other disabled teachers required to take leave. The protection accorded to pregnant teachers by the Court's decision is less satisfactory than that which might have resulted from a decision based upon the equal protection clause.

II. Due Process Analysis

A. *Historical Background*

The Supreme Court's early interpretations construed the due process clause of the fourteenth amendment narrowly.[11] By the turn of the century, however, the Court had decided that it had authority to judge the reasonableness of state economic legislation on the basis of judicially noticed facts.[12] The Court's determination that the due process clause entitled persons who were deprived of property by state laws[13] to a judicial hearing resulted in extensive judicial determinations of rates[14] and in sweeping invalidation of state legislation under a broad definition of constitutionally protected liberties.[15] These decisions are broadly defined as determinations of substantive due process.[16] The apogee of this trend was *Lochner v. New York*,[17] in which the Court invalidated a New York law fixing

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viewed the substance of the rules involved, not merely the manner in which they were enforced."

[11] *See* the Slaughter House Cases, 83 U.S. (16 Wall.) 36 (1872); Munn v. Illinois, 94 U.S. 113 (1877).

[12] Mugler v. Kansas, 123 U.S. 623, 661 (1887). The Court stated:

> The courts are not bound by mere forms, nor are they to be misled by mere pretences. They are at liberty—indeed, are under a solemn duty—to look at the substance of things, whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority. If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution.

[13] *See* Chicago, M. and St. P. R. Co. v. Minnesota, 134 U.S. 418 (1890). In this case, the Court held unconstitutional a state statute authorizing a commission to set railroad rates and forbidding any judicial review of the rates set.

[14] *Cf.* Smyth v. Ames, 169 U.S. 466, 546 (1898).

[15] *See* Allgeyer v. Louisiana, 165 U.S. 578, 589 (1897). The court described the broad scope of the meaning of *liberty* in the due process clause:

> [It] means not only the right of the citizen to be free from mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all of his faculties; to be free to use them in all lawful ways, to live and work where he will, to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned.

[16] Railway Express Agency v. New York, 336 U.S. 106, 111-13 (1949).

[17] 198 U.S. 45, 75 (1905). In his dissent, Justice Holmes objected to the Court's enact-

baker's hours at sixty hours a week on the ground that it interfered with the general right to make a contract, part of the liberty of the individual protected by the fourteenth amendment.[18]

In the 1930's the Court retreated from its position that the due process clause permitted it to examine the reasonableness of state economic legislation[19] and, for a variety of reasons,[20] granted a presumption of validity to state legislation, shifting the burden of proof from the state to the claimant.[21] The Court upheld state regulation of prices,[22] maximum hours and minimum wages for men,[23] women, and children,[24] discrimination in hiring and firing,[25] and other regulation of business and economics.[26] In general, due process decisions were limited to an examination of the criminal procedural guarantees[27] and Supreme Court activity under the fourteenth amendment shifted to an examination of equal protection claims.[28]

Some recent Supreme Court decisions have been regarded as a revival of sub-

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ing its own political philosophy, because the Constitution was ". . . not intended to embody a particular economic theory. . . ."

[18] *Id.* at 59.

[19] Nebbia v. New York, 291 U.S. 502, 537 (1934). The Court stated:

> So far as due process is concerned, and in the absence of other constitutional restriction, a state is free to adopt whatever economic policy may be reasonably deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose. The courts are without authority either to declare such policy, or, when it is declared by the legislature, to override it.

[20] West Coast Hotel Co. v. Parrish, 300 U.S. 379, 399 (1937). Upholding minimum wages for women and minors, the Court stated "We may take judicial notice of the unparalleled demands for relief which arose during the recent period of depression. . . . What these workers lose in wages, the taxpayers are called upon to pay."

Nebbia v. New York, 291 U.S. 502, 537 (1934). Retreating from consideration of a New York statute setting minimum and maximum prices on milk, the Court demurred, "With the wisdom of the [economic] policy adopted, with the adequacy or practicability of the law enacted to forward it, the courts are both incompetent and unauthorized to deal."

[21] United States v. Carolene Products Co., 304 U.S. 144, 152 (1938):

> Even in the absence of such aids [as legislative findings in reports of committees] the existence of facts supporting the legislative judgment is to be presumed, for regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators.

[22] Nebbia v. New York, 291 U.S. 502 (1934).

[23] United States v. Darby, 312 U.S. 100 (1941).

[24] West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937); Muller v. Oregon, 208 U.S. 412 (1908).

[25] Lincoln Federal Labor Union v. Northwestern Iron & Metal Co., 335 U.S. 525 (1949); Phelps Dodge Corp. v. N.L.R.B., 313 U.S. 177 (1941). These cases prevented discrimination by employers for union membership or for failure to acquire such membership.

[26] Railway Express Agency v. New York, 336 U.S. 106 (1949).

[27] Mapp v. Ohio, 367 U.S. 643 (1961) (holding that the due process clause requires inclusion of the fourth amendment search and seizure protections and the federal exclusionary rule); Palko v. Connecticut, 302 U.S. 319 (1937) (established that the due process clause did not require incorporation of the entire Bill of Rights, but only the rights which are of "the very essence of ordered liberty").

[28] *See* Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrines on a Changing Court: A Model for A Newer Equal Protection*, 86 HARV. L. REV. 1, 17 (1972) [hereinafter referred to as Gunther].

stantive due process, albeit not in the area of economics and business. In these cases, the Court has been willing to examine the reasonableness of legislation where it finds an infringement upon or a deprivation of a fundamental constitutional liberty.[29] The pre-1930's due process decisions of *Pierce v. Society of Sisters*,[30] *Meyer v. Nebraska*,[31] and *Prince v. Massachusetts*[32] established a fundamental liberty of parents to decide how to bring up and educate their children. These cases were relied on in recent Supreme Court decisions which extended the definition of family rights. In *Griswold v. Connecticut*,[33] *Eisenstadt v. Baird*,[34] and *Roe v. Wade*,[35] the Court defined a constitutionally protected individual right to privacy in deciding whether or not to bear or beget children.

The *LaFleur* Court cited all these decisions for the proposition that "freedom of personal choice in matters of marriage and family life" is a liberty protected by the due process clause.[36] The Court's reliance on such sources has been viewed as supporting the contention that the Court is again reviving substantive due process in *LaFleur*.[37]

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[29] *See* Nowak, *supra* note 10, at 1089, 1104.

[30] 268 U.S. 510, 534 (1925) (invalidating state statutes requiring attendance at public schools on grounds that it interferes with the liberty of parents to direct the upbringing and education of children under their control).

[31] 262 U.S. 390, 399-401 (1923) (invalidating a state statute prohibiting the teaching of any modern language to children in private or public schools on grounds it interfered, without a reasonable basis, with the occupation of modern language teachers, the pupils' opportunities to acquire knowledge, and the parents' control of the education of their own children, all liberties protected by the due process clause).

[32] 321 U.S. 158 (1943) (upholding a state statute regulating child labor as applied to a mother who took her child out at night to deliver religious pamphlets, the Court found a parent's right to bring up a child could be limited by the state's right to safeguard the child's welfare).

[33] 381 U.S. 479 (1965) (invalidating state laws prohibiting the use and sale of contraceptives on the ground that the laws infringed on the rights to association and marital privacy guaranteed by the ninth amendment).

In a concurring opinion, Justice Goldberg joined by Chief Justice Warren and Justice Brennan, discussed the effect of upholding a law prohibiting birth control in language relevant to *LaFleur*:

> While it may shock some of my Brethren that the Court today holds that the Constitution protects the right of marital privacy, in my view it is far more shocking to believe that the personal liberty guaranteed by the Constitution does not include protection against such totalitarian limitation of family size, which is at complete variance with our constitutional concepts. Yet, if upon a showing of a slender basis of rationality, a law outlawing voluntary birth control by married persons is valid, then, by the same reasoning, a law requiring compulsory birth control also would seem to be valid. In my view, however, both types of law would unjustifiably intrude upon rights of marital privacy which are constitutionally protected. *Id.* at 497.

[34] 405 U.S. 438, 453 (1972). The Court upheld the right of a single woman to buy contraceptives on the ground that there is a constitutional right "to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."

[35] 410 U.S. 133 (1973) (invalidating anti-abortion statutes and restrictive procedures on grounds that the court must apply strict scrutiny where it recognizes a right to personal privacy in activities relating to marriage, procreation, contraception, and in the upbringing and education of children; this right to privacy is guaranteed by the ninth amendment and found in the penumbra of other amendments).

[36] 414 U.S. at 639-40.

[37] Nowak, *supra* note 10, at 1107.

However, the Court has recently decided cases which essentially are limited to an examination of procedural due process afforded in a noncriminal context by both judicial and administrative bodies. In these decisions, the Court limits its examination to the fairness of the procedure provided by government when it deprives an individual of tangible goods,[38] salary,[39] or jobs.[40] As will be shown, *LaFleur* does not attack the substance of the maternity leave rule; rather, it grants the school boards the right to require mandatory maternity leave.[41] Furthermore, it does not question the boards' characterization and treatment of maternity leave as qualitatively different from leave for other disabilities. Unless the early cut-off date and the delayed return constitute the entire substance of maternity leave, the Court's decision seems to be limited to examining the procedure for determining the appropriate time for the commencement of maternity leave.

B. *The Due Process Analysis in* LaFleur

1. Protected Property and Liberties

In its analysis of maternity leave rules, the Court followed, for the most part, the guidelines outlined in *Board of Regents of State College v. Roth*[42] for determining whether constitutional requirements for procedural due process have been met in government employment. The Court also drew on the more recent procedural due process cases of *Stanley v. Illinois*[43] and *Vlandis v. Kline*,[44] for the concept of irrebutable presumptions.

In *Roth*, the Supreme Court established the degree to which the due process clause protects the rights of teachers and other public employees to employment. Roth was a first-year college teacher on a one-year contract who was not rehired for the following year. His contract did not require a hearing before termination, but the Supreme Court found that this was not a violation of Roth's procedural rights.[45] The Court constructed a two-step analysis of procedural due process. First, a determination must be made of whether due process requirements apply in a particular case. Since these requirements apply only to interests encompassed by the fourteenth amendment's protection of liberty and property, it is only upon denial of such protected interests that the employee has a right to *some kind* of prior hearing. Second, once it is determined that due process requirements do

[38] Fuentes v. Shevin, 407 U.S. 67 (1972) (limiting the seizure of household goods under a writ of replevin by suggesting that fair notice and hearing are required); Bell v. Burson, 402 U.S. 535 (1971) (continued possession of a driver's license may become essential in pursuit of a livelihood; such an entitlement, whether a right or privilege, is not to be taken away without procedural due process).

[39] Goldberg v. Kelly, 397 U.S. 254 (1970) (entitlement to public assistance is a property right requiring a fair hearing before being terminated or reduced); Sniadach v. Family Finance Corp., 395 U.S. 337 (1969) (requiring notice and preliminary hearing before garnishment of wages).

[40] Board of Regents of State Colleges v. Roth, 408 U.S. 564 (1972) (some form of hearing is required where governmental employment is terminated in a manner which infringes on fundamental liberties).

[41] 414 U.S. at 641-43.

[42] 408 U.S. 564, 570 (1972).

[43] 405 U.S. 645 (1972).

[44] 412 U.S. 441 (1973).

[45] 408 U.S. at 578.

apply, the individual interests of the employee and the public interests of the governmental body may be balanced to determine the *form* of hearing constitutionally required.[46]

The *Roth* Court confirmed that the due process clause protects property as well as liberty. However, the Court displayed its continued reluctance to interfere with state regulation of economic matters by severely limiting the degree to which property rights can be judicially determined. Constitutional protection extends only to those property interests to which a person holds a legitimate claim of entitlement. A property interest is not created by the Constitution; rather, it is defined by existing rules or understandings that stem from an independent source, such as state law, and which secure certain benefits and support claims of entitlement to those benefits.[47] The Court held that Roth's property interests were defined by the terms of his contract, and that contract made no provision either for renewal or for a hearing prior to expiration.[48]

Like those in *Roth*, the property interests of the school teachers in *LaFleur* were defined and limited by their contracts and by the mandatory maternity leave rules promulgated by the school boards. The teachers had no claims to employment after the early cut-off date established by the boards until after the birth of their children. Thus, there was no deprivation of the teachers' property interests under the due process clause and the *LaFleur* Court did not suggest that there was.

The liberties protected by the due process clause have not been defined with exactness, but the *Roth* Court did find that previous cases had determined that some liberties were clearly within the scope of the clause.[49] Liberty denotes not merely freedom from bodily constraint, but also the right of the individual to marry, to establish a home, and to bring up children.[50] Because the Court found that Roth had suffered no defamation of name and no infringement of his first amendment right to freedom of speech, he did not have a substantial interest requiring an opportunity for fair notice and a hearing.[51]

In *LaFleur*, however, the Court established that teachers had been deprived of liberties encompassed by the fourteenth amendment and were, therefore, entitled to a more particularized determination of the date for beginning and ending their mandatory maternity leaves.[52] Freedom of personal choice in matters of marriage and family life, and, in particular, the freedom to decide whether to bear or beget a child, are liberties protected by the due process clause.[53] Overly

[46] *Id.* at 570-71.

[47] *Id.* at 577.

[48] *Id.* at 578.

[49] *Id.* at 572, citing Meyer v. Nebraska, 262 U.S. 390 (1923) (a state could not limit parents' right to choose a private education which included the teaching of German, although it could choose the curriculum for the public schools), and Stanley v. Illinois, 405 U.S. 645 (1972) (a state could not presume that a father of an illegitimate child was unfit to care for the child after its mother's death).

[50] 408 U.S. at 472, quoting Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

[51] 408 U.S. at 575, n. 14. In his dissent, Justice Douglas argued that Roth's first amendment rights might have been violated, since he had strongly criticized the administration. Even though he had no tenure, the reasons for nonrenewal should be examined to see if they are only a cloak for an attack on activity or attitudes protected by the Constitution. 408 U.S. at 582.

[52] 414 U.S. at 639, 647.

[53] 414 U.S. at 640, citing Eisenstadt v. Baird, 405 U.S. 438 (1972).

restrictive maternity leave regulations, the *LaFleur* Court concluded, constituted a heavy burden on the exercise of a protected freedom because they penalize the pregnant teacher for deciding to bear a child.[54] Thus, the Court made the first determination required by *Roth*: due process requirements were applicable because a protected liberty had been infringed upon by the board rules.[55]

The Court took the second step required by *Roth*[56] by examining the respective interests of the school boards and teachers. It began by examining the interests advanced by the school boards in support of the rules to see if these interests justified the particular procedures adopted by the boards. Four possible board interests were found: (1) protecting teachers from embarrassment and insulating school children from the sight of pregnancy,[57] (2) maintaining continuity in classroom instruction,[58] (3) keeping physically unfit teachers out of the classroom,[59] and (4) providing for administrative convenience.[60]

The Court dealt summarily with the first interest in a footnote because the school board's briefs did not contend that this concern was a legitimate basis for the rules.[61] An interest in keeping pregnancy out of sight of children and preventing embarrassment for the teacher could not support the early cut-off dates.

The board's interest in continuity of instruction, although significant and legitimate, was also found to be insufficiently related to the boards' requirements of an early cut-off date to justify the rule. Indeed, the rule itself may interfere with continuity when it requires, as it did in *LaFleur*, that the teachers quit in the middle of the year when they may be able to complete it. The Court did find, however, that the boards' concern for continuity of instruction supports their requirement of advance notice of a firm date of departure, the date to be either chosen by the teacher or set by the school board at a point a few weeks before the expected delivery date.[62] The same interest supported the Cleveland board provision limiting eligibility to return the semester following the birth. The Court regarded that provision as a "precisely drawn" means of avoiding unnecessary changes in classroom personnel during any one school term.[63]

The interest in keeping physically unfit teachers out of the classrooms was found

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[54] 414 U.S. at 640.

[55] 508 U.S. at 570-71.

[56] *See, id.* at 570.

[57] 414 U.S. at 641, n. 9.

[58] *Id.* at 641.

[59] *Id.* at 641-43.

[60] *Id.* at 643-46.

[61] At the trial, the former Cleveland school superintendent testified that the embarrassment of pupils and teachers had been a concern. At the time the rule was promulgated in 1952, Chesterfield County Board members testified that these matters were still a matter of concern. 414 U.S. at 641, n. 9. The Court refused, however, to impart legitimacy to this concern. Rather, it noted the possible role of "outmoded taboos" in the adoption of the rules. They agreed with the Second Circuit, which had opined in *Green v. Waterford Board of Education*, that "whatever may have been the reaction in Queen Victoria's time, pregnancy is no longer a dirty word." 473 F.2d 629, 635 (1973) *cited at* 414 U.S. at 641 n. 9.

[62] 414 U.S. at 643.

[63] *Id.* at 649. The Court did not discuss whether the Chesterfield County rule preventing return until the following school year was precisely drawn. Since this long period of unemployment can be a heavy burden for a teacher to bear, a more precisely drawn rule would permit teachers to return at earlier natural breaks in the school year.

by the Court to be legitimate on both educational and safety grounds. However, the Court decided that, even assuming that *some* teachers become physically disabled during the latter stages of pregnancy, the rules sweep too broadly in requiring *all* pregnant teachers to leave.[64] Furthermore, the Cleveland rule that a teacher may not return to work until her child is three months old is arbitrary and irrational because it is not reasonably related to the board's asserted interest in the mother's fitness.[65]

In discussing this third interest, the Court drew on the recent due process decisions of *Vlandis v. Kline*[66] and *Stanley v. Illinois*[67] which held that permanent irrebutable presumptions are disfavored under the due process clauses of the fifth and fourteenth amendment. When a presumption is "neither necessarily nor universally true in fact," and when the state has reasonable alternative means of making the crucial determination, the due process clause requires that the state make an individualized determination.[68]

As in *Vlandis* and in *Stanley*, the Court in *LaFleur* applied the concept of the "irrebutable presumption" to the boards' early leave dates and to Cleveland's three-month rule. The early cut-off rule presumes that every teacher who reaches the fifth or sixth month of pregnancy is physically incompetent to continue teaching. The Court held that testimony in the trial court by expert witnesses established that such a presumption is neither necessarily nor universally true.[69] The Court also found irrebutable presumptions in the Cleveland rule preventing the teacher's return for three months after childbirth.[70] The rule contained conclusive presumptions to the extent that it reflected board thinking that no mother is physically able to return for three months after birth or that new mothers are too busy with their children within the first three months to allow a return to work.[71] A consensus of medical sources indicated that new mothers can return to full activity or employment four or five weeks after childbirth if progress is normal.[72] Because the boards had reasonable alternative means of making an individualized determination, they could not use an irrebutable presumption.[73]

The boards' final justification, their interest in administrative convenience, was found by the Court to be insufficient, alone, to make valid what otherwise is a vio-

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[64] *Id.* at 644.

[65] *Id.* at 649. Trial testimony by the former superintendent, Dr. Mark Schinnerer, indicated that he originally prohibited mothers from returning for six months after the birth because he believed mothers should stay home with their children. Respondent's brief, Appendix 184a.

[66] 412 U.S. 441 (1973). In *Vlandis*, the Court declared unconstitutional a Connecticut statute which mandated an irrebutable presumption of nonresidency (if applicants applied from or resided out-of-state) for the purpose of qualifying for reduced tuition rates.

[67] 405 U.S. 645 (1972). In *Stanley*, the Court declared unconstitutional an Illinois statute which permitted the state to take custody of all illegitimate children upon the death of the mother, without allowing the father to attempt to prove his parental fitness. It held that the statute contained an irrebutable presumption that unmarried fathers are incompetent to raise their children, a presumption which violated the due process clause.

[68] 414 U.S. at 645.

[69] *Id.*

[70] *Id.* at 649.

[71] *Id.* at 649 n. 15.

[72] *Id.* at 645 n. 12.

[73] *Id.* at 645.

lation of due process of law.[74] Citing *Stanley v. Illinois*,[75] the Court reaffirmed that the "Constitution recognizes higher value than speed and efficiency."[76] The fourteenth amendment, therefore, requires the boards to use alternative means which do not so broadly infringe upon the teacher's constitutional liberty.[77]

2. Balancing of Interests

Since the lack of an individualized determination of fitness flawed the boards' maternity rules, a case-by-case determination would seem to be the appropriate form of hearing for determining the teachers' ability to work both before and after pregnancy. However, the *LaFleur* Court mitigated the harshness of the *Stanley* principle by considering the boards' interests in both administrative convenience and continuity in the classroom. Thus, the Court took the second step outlined in *Roth*:[78] balancing the individual teacher's rights against the school board's interests to determine the appropriate forms of hearing for providing constitutional due process to teachers taking maternity leave. The Court permitted the school boards to require a teacher to submit health certificates from her own physician or to have a medical examination by a school board physician in order to determine her fitness to work before and after childbirth.[79] However, the Court left open the possibility that the boards may require a firm cut-off date during the last few weeks of pregnancy, if justified by considerations not presented in *LaFleur*.[80] Boards may also require substantial advance notice of a firm cut-off date for their convenience in finding a substitute.[81] To insure continuity, they need not permit the teacher to return during a semester.[82]

C. *Limitations of the Due Process Analysis*

1. Future Application

In his dissent to *LaFleur*, Justice Rehnquist expressed fear that the thousands of state and federal laws which draw lines which are less than perfect and which might well prove to be arbitrary in individual cases will be vulnerable to the "irrebutable presumption" analysis. In particular, he suggested that classifications which establish age limits, such as laws regulating the activities of minors and the retirement of older people, might be invalidated by the *LaFleur* decision. Individualized hearings might be required to determine whether minors are mature enough to (1) drink alcoholic beverages and drive cars, (2) vote, (3) run for political office and (4) marry. Justice Rehnquist was particularly afraid that *LaFleur* might also lead to the invalidation of (5) mandatory government retirement stat-

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[74] *Id.* at 647.
[75] *Id.* at 646, *citing* 405 U.S. 645 (1972).
[76] 405 U.S. at 656.
[77] 414 U.S. at 647.
[78] 408 U.S. at 570.
[79] 414 U.S. at 647 n. 14.
[80] *Id.* at 647 n. 13, 649.
[81] *Id.* at 643.
[82] *Id.* at 649.

utes, requiring instead a hearing to determine whether each person was still healthy enough to work.[83]

The flaw in Justice Rehnquist's opinion is that he failed to consider that under the procedural due process analysis legislative classifications are not defeated *merely* because they include irrebutable presumptions. Procedural due process also requires, initially, that a fundamental right be impinged upon and, secondly, that the form of hearing adequately protect the interests of the parties. In some circumstances, a fundamental right may not be involved; in others, individualized hearings may not be appropriate. With this in mind, the widespread invalidation of legislation feared by Justice Rehnquist is unlikely to materialize.

Few laws regulating minors infringe upon constitutional rights or liberties. No case has established a constitutional right to drive a car, to drink, or, for that matter, to stay out after municipal curfew or to live independently of parental or state supervision.

A citizen's right to vote has already been found deserving of constitutional protection under the equal protecton clause of the fourteenth amendment[84] and may also be deserving of protection under the due process clause. Where a citizen has been deprived of the right to vote on an equal footing with other citizens in the jurisdiction, classifications have been examined with strict scutiny and states must show a necessary and compelling interest in support of them.[85] Relying on these cases, the Court might consider voting to be a fundamental right requiring individualized determination were it not for the strong policy behind the Voting Rights Acts of 1965[86] and 1970,[87] the Court's interpretation of those Acts,[88] and the twenty-sixth amendment to the Constitution.[89] This policy favors broad grants of suffrage and the prohibition of potentially discriminatory qualifying procedures. The primary purpose of the Voting Rights Acts was to eliminate individualized determinations by the states of voting ability through the use of discriminatory literacy

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[83] *Id.* at 647-59.

[84] Dunn v. Blumstein, 405 U.S. 330 (1972); Reynolds v. Sims, 377 U.S. 533 (1964).

[85] Dunn v. Blumstein, 405 U.S. 330 (1972); Kramer v. Union Free School Dist. No. 15, 395 U.S. 621, 627 (1969).

[86] 42 U.S.C. § 1973 (1965).

[87] 42 U.S.C. § 1973 (Amended, 1970).

[88] Oregon v. Mitchell, 400 U.S. 112 (1970); Katzenbach v. Morgan, 384 U.S. 641 (1966). In *Mitchell* the Court upheld the constitutionality of provisions of the Voting Rights Act of 1965 lowering the age limit to 18 for federal elections, but did not uphold the provisions lowering the age for state and local elections. It also found that Congress had the power to prohibit the use of literacy tests or other devices used to discriminate against voters. In *Katzenbach* the Court held that § 4(e) of the Voting Rights Act of 1965 was a proper exercise of power granted to Congress by the enabling clause of the fourteenth amendment. Section 4(e) provided that no person who completed the sixth grade of a school accredited by Puerto Rico could be denied the right to vote in any election because of his inability to read or write English. Besides the provisions mentioned above, the Voting Rights Act of 1965, 42 U.S.C. § 1973 *et seq.* (1970) provided for federal examiners (in certain areas of the country). The 1970 Amendments, 42 U.S.C. § 1973b (1970), barred the use of literacy tests in *all elections* for five years and forbade states from disqualifying voters in national elections by using state residency requirements.

[89] The twenty-sixth amendment provides:

> Section 1. The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any state on account of age.

tests. The twenty-sixth amendment lowered the voting age for *all* elections, reflecting the national consensus that at the age of eighteen American citizens are mature enough to vote. The amendment and the statutes establish that government has sufficiently weighty interests in preventing the reinstatement of the individual hearings so abused in the past. The Court may therefore regard itself as bound by precedent and by national policy in upholding a uniform age requirement.

Not only are individualized hearings weapons for abuse of the rights of minority groups, they are also available for use against political groups. Indeed, the potential abuse of individual determinations of ability by incumbent political parties may be viewed as an overriding state interest which would militate against their use in determining either the capacity to vote or the qualifications for candidacy.

The laws prohibiting the marriage of minors may be subject to attack under the equal protection clause, since many of them discriminate between the sexes by allowing women to marry at a lower age.[90] Such laws are less likely, however, to be found to violate the due process clause. First, many of them already provide for a kind of individualized hearing by permitting under-age persons to marry with their parents' consent.[91] Second, even though it might be claimed that such statutes infringe upon the fundamental right to marry,[92] many lower courts have found that a state's interest in creating stable family life is not only a rational basis for marriage and divorce legislation, but also a compelling state interest where the equal protection clause requires a strict standard of review.[93] Thus, in balancing state interests to determine the appropriate form of hearing, courts might well decide that state interests in family stability can require young people to be old enough to have had an opportunity to complete their high school education or to prepare for work before assuming the responsibilities of marriage. Courts might also decide that an appropriate form of hearing for the under-age person is that hearing provided by parents, who are both responsible for the person's welfare and best able to judge his or her maturity.[94]

Justice Rehnquist's assertion that mandatory retirement laws may be invalidated

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[90] *See, e.g.*, OHIO REV. CODE ANN. § 3101.01 (Page 1973) (male persons of the age of eighteen years and female persons of the age of sixteen years may be joined in marriage; a minor must first obtain the consent of his parents or court-appointed guardian). *See also* AM. JUR.2D DESK BOOK, Doc. 124, *Marriage Laws*, Oct. 1971, Department of Labor, Women's Bureau, (Supp. 1974).

[91] Some states require parental consent for persons under twenty-one and many states permit marriage at an even younger age with parental consent. *See* AM. JUR.2D DESK BOOK, *supra* note 90.

[92] The Supreme Court has long recognized that states have primary responsibility for legislation in regard to marriage and divorce. *See* Williams v. North Carolina, 325 U.S. 226, 237 (1944). The Court stated in *Williams* that the inability to establish domicile is merely "one of the untoward results inevitable in a federal system in which regulation of domestic relations has been left with the states and not given to the national authority."

[93] Durational residency requirements have been upheld because courts found that the states' interest in the stability of the family unit can outweigh an infringement on the right to travel. Place v. Place, 129 Vt. 326, 278 A.2d 710 (1971); Shiffman v. Askew, 359 F. Supp. 1225 (M.D. Fla. 1973).

[94] Almost all the states permit women to marry at a younger age than men, but this difference may more likely be a reflection of cultural sex-role expectations than of a presumption that women are mature or educated at an earlier age.

by due process claims is based upon the assumption that the Court regards a right to work as resting on the same footing as the right to bear children.[95] However, in *LaFleur* itself, the Court refused to base its opinion on the right to work, even though an amicus brief argued that it should.[96] Relying on *Truax v. Raich*,[97] this brief contended that because the maternity leave rules infringed on the fundamental right to work, the strict standard of review required by the equal protection clause should be applied to them.[98]

Truax, decided in 1915, was one of the few cases asserting that a right to work is one of the liberties protected by the fourteenth amendment. Another such case, *Meyer v. Nebraska*,[99] decided in 1922, was cited by the *LaFleur* Court,[100] not for its assertion that a teacher's right to teach was a fundamental liberty, but rather for the principle that freedom of personal choice in matters of marriage and family life constitutes such a liberty. Thus, the majority of the Court eschewed the argument that the right to work is a fundamental right, and found an infringement only on the teacher's fundamental right to decide whether to bear or beget a child.[101] Thus, the mandatory retiree cannot claim that he is deprived of a fundamental right by the statutory limit on his job. Like Roth, he must have some other constitutional claim as well.

Even were the Court to find a constitutional deprivation either in the laws regulating minors or in the retirement laws, the magnitude of the administrative inconvenience resulting from individual hearings required for every person nearing majority or retirement age might be a weighty enough state interest to balance the individual's constitutional rights. Even in *LaFleur*, the Court left loopholes relieving the school of having to provide individualized hearings for every pregnant or returning teacher.[102] Thus, at some point, administrative convenience *alone* may become a sufficient interest to outweigh a constitutional right.

Although the constitutional attacks on age classifications which Justice Rehnquist anticipates would probably be unsuccessful, he is probably accurate in suggesting that there may be a flood of litigation to test the limits of the due process concepts generally, and of the "irrebutable presumption" in particular.

2. The Adequacy of the Due Process Provided in *LaFleur*

The remedies to the procedural due process flaws found in the maternity leave rules were limited to the Court's suggestion of possible alternative forms of hear-

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[95] 414 U.S. at 649 *citing* Traux v. Raich, 239 U.S. 33, 41 (1913).

[96] Brief for International Association of Official Human Rights Agencies as Amicus Curiae.

[97] 239 U.S. at 41. The *Truax* Court stated: "[T]he right to work for a living in a common occupation is of the very essence of the personal freedom and opportunity that it was the purpose of the [fourteenth] amendment to secure."

[98] Brief, *supra* note 96, at 27.

[99] 262 U.S. 390 (1922). The Court invalidated a statute which prohibited the teaching of all modern languages except English in any school in Nebraska. The statute effectively prevented the practice of an entire profession, and the Court found that it violated the due process clause because it was arbitrary and without a reasonable relation to the stated purpose *i.e.*, the "Americanization" of immigrant children.

[100] 414 U.S. at 639.

[101] *Id.* at 640.

[102] 414 U.S. at 647 n. 13. The Court allows the Board either to set a uniform cut-off date late in pregnancy, or to let the teacher choose a firm date.

ings which the boards could use in lieu of the early cut-off date and of the requirement that the child have reached the age of three months before the mother's return. While *LaFleur* authorized more flexible and less burdensome policies, it also effectively empowered school boards to prevent immediate return to school and to avoid a fair hearing. In short, the majority opinion in *LaFleur* makes it possible for the school board to institute alternative procedures that would serve the board's interests in administrative convenience, but could result in penalizing the pregnant teacher as much as did the pre-*LaFleur* rules.

(a) Rebuttable presumption of incapacity. The opinion states that irrebuttable presumptions are disfavored under the due process clause.[103] However, there is nothing in the opinion which obviates the possibility of a rebuttable presumption that a teacher is unfit to teach after four or five months of pregnancy (or even earlier). The school board could require the teacher to rebut this presumption by producing proof of her health with a medical certificate, perhaps every week, or upon request.[104] However, such a procedure, without legitimate grounds, is the kind of harrassment that should be considered a prima facie violation of a teacher's rights. Furthermore, in *LaFleur*, the Supreme Court was willing to assume only that *some* teachers become disabled during the latter stages of pregnancy, not *many* teachers,[105] and nowhere explicitly mentioned the possibility of establishing a rebuttable presumption.

(b) Board-established leave date. While the Court did recognize the possibility of a firm date set by the teacher herself, it also recognized the permissibility of a firm date during the last few weeks of pregnancy established by the school board.[106] The same objections can be made to such a regulation as were made to the early cut-off date. It contains a presumption of unfitness unsupported by the medical testimony and medical sources before the Court.[107] Second, the rule is inconsistent in that it would protect the students from the sight of labor, but not from the sight of morning-sickness or from the onset of spontaneous abortions which may be sudden, unexpected, and painful, and which may occur during the first three months of pregnancy, a period during which no teacher is required to take maternity leave. Further, a board-set firm date provides no more classroom continuity and administrative convenience than does a firm date set by the teach-

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[103] 414 U.S. at 644.

[104] The hearing provided for by Chesterfield County rule (b.) provided the opportunity for such a rebuttal, but it also provided for a consideration of the "best interests" of the school, regardless of the teacher's health. *See* note 5 *supra.*

[105] 414 U.S. at 644. The Court had before it statistics which indicated that 60-70% of all pregnancies are normal.

[106] 414 U.S. 647 n. 13. The Court suggested that such regulations might be justified by considerations not presented in the *LaFleur* records, *e.g.*, widespread medical consensus about the disabling effect of pregnancy on a teacher's performance during the last weeks, evidence showing that the requirement of firm cutoffs was the only reasonable method of preventing labor from beginning while the teacher was in the classroom, or proof that adequate substitutes could not be procured without at least some minimal lead time and certainty as to the date upon which employment was to begin.

[107] 414 U.S. at 645-46 n. 12. Medical witnesses for both parties emphasized that each pregnancy is an individual matter and should be treated as such. They also testified that they themselves permitted patients to work to the end of pregnancy, to participate in vigorous physical activity, and to continue to do housework, which, it was acknowledged, was more physically strenuous than teaching. Respondent's brief, Appendix 121a, 150a.

er.[108] Thus, the boards may further penalize pregnant teachers by setting an unrealistic leave date.

(c) Summary determination of incapacity. *LaFleur* permits the school doctor to have the last word where a disagreement over the teacher's fitness occurs. Such a summary procedure provides inadequate due process when compared to the normal concept of a fair hearing, and, in fact, when compared to the hearing provided by Ohio law[109] for Ohio school teachers who have been asked to take "unrequested leave." Section 3319.16 of the Ohio Revised Code provides for notice, for a hearing examiner drawn from the local bar, for the opportunity to be represented by counsel and to present and cross-examine witnesses, and for a written result.[110] In short, the non-pregnant Ohio teacher receives the full panoply of due process under Ohio law, but the pregnant Ohio teacher may find herself in a kangaroo court after *LaFleur*.

(d) Return to classroom duties. Since the Court objected to the three month rule only because it contained an "irrebuttable presumption," a board might nevertheless establish some procedure for the teacher's return. Although an *irrebuttable* presumption of incapacity would be impermissible, the possibility of a *rebuttable* presumption to that effect again arises. The teacher would then have the burden of proving her good health and her independence from the child. The Court even appears to approve of the means for presenting this proof: *viz.*, the doctor's health certificate,[111] and, in Chesterfield County, the requirement that the teacher return only when she can give "full assurance that the child will cause minimal interference with job responsibilities."[112] However, the Court also expressed skepticism about any kind of presumption that teacher-mothers are unfit or too busy with children.[113] Thus, the board which establishes even a rebuttable presumption in a return rule would be undercutting the policy behind the Court's decision, *i.e.* to free new mothers from stereotyped views of post-partum behavior. Further, no fair hearing is required in the event of disagreement between the school board and the teacher's doctor as to her health. As with the leave date, the school board doctor's decision prevails.[114]

A less evident, but perhaps more severe, penalty may result from certain regulations as yet permissible under *LaFleur*. The Cleveland rule provides for priority for the returning teacher on reassignment to a vacancy for which she is qualified,

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[108] It is worth noting that Cleveland required no more than two weeks notice of leave and, often, admittedly filled in with substitutes, sometimes even with students. *See* note 6 *supra*, and Respondent's brief, Appendix 210e (testimony of Julius Tanczos, Jr., Secondary School Superintendent of Cleveland Public Schools) Thus, continuity in the classroom does not appear to have been the primary reason for either the early leave date or for the advance notice requirement.

[109] OHIO REV. CODE ANN. § 3319.16 (Page 1972).

[110] Before *LaFleur*, the opportunity for a fair hearing provided by state law was not provided to teachers required to go on maternity leave; neither LaFleur nor Nelson were permitted to avail themselves of this opportunity. The most they were provided with was an informal request to the Superintendent for continuation in their jobs. At trial, LaFleur described herself as being on "unrequested leave," but complained that the Board had failed to provide her with the required fair hearing. Respondents' brief, Appendix 69a.

[111] 414 U.S. at 647 n. 14.

[112] *Id.* at 650 n. 16.

[113] *Id.* at 649 n. 15.

[114] *Id.* at 650.

but not to the exact position she had before her leave.[115] The Chesterfield County rule goes a step further and states that it will offer only one opening to the teacher upon her return, thus "discharg[ing] its responsibility under this policy." These rules combined with the rules that delay the teacher's return until the following semester or year may help to effectuate a policy of keeping budgets low by hiring new, inexperienced teachers at low salaries, rather than rehiring experienced teachers at higher salaries who wish to come back to work after having children.[116]

Thus the Court's due process analysis and remedies may result in something less than adequate due process for pregnant school teachers. Unlike that authorized by *LaFleur*, the procedure that would best serve teachers' interests would be one that permits the teacher herself to set a firm date for taking leave before childbirth, requires a medical certificate of health only if individual capacity is seriously questioned, permits her to return to her own classroom as soon as her doctor determines that she is physically fit, and finally, permits a fair hearing if the school board disagrees with her doctor's certification of health, either before or after childbirth.

Further, the due process analysis leaves some of the most onerous provisions of the maternity leave policies untouched. Unlike teachers who take leave for other disabilities, teachers taking maternity leave may, under *LaFleur*, lose several months of work due to the next-semester rule, receive no pay for sick leave, must sustain the burden of proof of their good health, and may be "pushed out" of their profession by the severe rules regulating their return to work and providing for dismissal. Had the Court based its decision on an equal protection analysis, school boards would have been required to treat maternity leave as they treat other temporary disabilities, providing a quicker return to the classroom, a fair hearing, and sick leave pay.[117]

III. The Equal Protection Analysis

Recent equal protection decisions have generally fallen into two categories:

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[115] *See* note 6 *supra.*

[116] Since it is similar to many large city school systems, the Columbus, Ohio, school system provides a good example of the effect of such policies. In the 1973-74 school year, 41% of the elementary teachers had less than 5½ years experience. On the junior high level, 51% had less than 5½ years experience. *See* Thompson, The Columbus School Report (July, 1974). In an interview (Oct. 30, 1974), Mr. Thompson stated that these percentages had been declining in the last few years due to the tighter job market and, perhaps, to the fact that female teachers were not leaving the school system with as much frequency.

[117] After the Sixth Circuit opinion in *LaFleur*, the Ohio legislature amended the statute requiring sick leave pay for teachers by adding "pregnancy" to the required coverage. OHIO REV. CODE ANN. § 3319.141 (Page Supp. 1974). The amendment appears to permit the use of sick leave pay for pregnancy *at any stage*, without limiting the use of sick leave to the period of disability resulting from pregnancy and childbirth. Such broad coverage presents the possibility of abuse of this benefit by teachers who use up their accumulated sick leave days during a period of pregnancy when they are not disabled. Commentators have suggested that two kinds of leave should be available to pregnant employees: (1) leave for the disabilities of pregnancy and childbirth *with* sick leave benefits to be available to female employees; (2) leave for child care, beginning after recuperation from childbirth, with a guaranteed job after one or two years (but without sick pay or increases in fringe benefits) to be available on a non-discriminatory basis to *either* parent. *See* Koontz, *Childbirth and Child Rearing Leave: Job related Benefits*, 17 N.Y. LAW FORUM 480, 481 (1971) *citing* Citizens Advisory Council on the Status of Women, *Women in 1970* at 4 (1971); Comment, *Love's Labors Lost: New Conceptions of Maternity Leave*, 7 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 260, 291 (1972).

(1) those applying a minimal standard of review requiring that state legislation be upheld if the Court cannot conceive of any reasonable basis for the classification[118] and (2) those applying a stricter standard of review where a suspect classification or a fundamental right exists and requiring the state to show both that it has a compelling interest in the classification and that it can find no less restrictive means to pursue that interest.[119] Within the last few years, the Court seems to have become dissatisfied with this two-tiered, self-predicating equal protection analysis and has begun to develop a middle ground for judicial examination under both the due process and equal protection clauses requiring a demonstrably reasonable basis[120] for legislation which infringes on constitutionally protected liberties or affects classifications which the Court is unwilling to consider "suspect."[121]

Most lower court decisions dealing with the maternity leave issue were based on equal protection grounds.[122] Although the equal protection arguments have been discussed in detail elsewhere,[123] a summary of them will be helpful in sug-

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[118] In Williamson v. Lee Optical of Oklahoma, 348 U.S. 483 (1955), (upholding a state statute prohibiting opticians from fitting glasses or making lenses without prescription), the Court speculated about possible reasons for enacting the legisation without any legislative source on which to rely. The Court refused to apply the equal protection clause unless discrimination was found to be "invidious."

[119] *See* for a definition of suspect classifications: Yick Wo v. Hopkins, 118 U.S. 356 (1886) (striking down municipal legislation discriminatory in its application to Chinese laundrymen, the Court found discrimination on the basis of race, nationality, or alienage unjustified and unconstitutional under the equal protection clause); Korematsu v. United Staes, 323 U.S. 214, 216 (1944):

> . . . [A]ll legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny. Presenting public necessity may sometimes justify the existence of such restrictions; racial antagonism never can.

Cases involving infringement on fundamental rights include: Skinner v. Oklahoma, 316 U.S. 535 (1942) (compulsory sterilization for criminals infringes on marriage and procreation, basic civil rights which are fundamental to the survival of the human race); Loving v. Virginia, 388 U.S. 1 (1967) (Statute prohibiting inter-racial marriage infringes on the right to marriage); Harper v. Virginia State Bd. of Elections, 382 U.S. 663 (1966) (poll tax infringes upon the right to vote); Shapiro v. Thompson, 394 U.S. 618 (1969) (durational residence requirement for welfare recipient infringes upon the right to travel).

[120] Reed v. Reed, 404 U.S. 71 (1971):

> The Equal Protection Clause of that Amendment does, however, deny to the States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. A classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike. . . ."

Id. at 75-76 *quoting* Royster Guano Co. v. Virginia, 253 U.S. 415 (1920). In *Reed*, the Court invalidated a statute discriminating on the basis of sex between persons applying for letters of administration because the classification was arbitrary and could not be upheld merely to accomplish the elimination of hearings on the merits. *See also*, Gunther, note 28 *supra*, at 18-24; Nowak, note 10 *supra*.

[121] See Nowak, note 10 *supra*, at 1103.

[122] *See, e.g.*, Cohen v. Chesterfield County School Bd., 326 F. Supp. 1159 (E.D. Va. 1971), 474 F.2d 395 (4th Cir. 1973); LaFleur v. Cleveland Bd. of Educ., 326 F. Supp. 1208 (N.D. Ohio 1971), 465 F.2d 1184 (6th Cir. 1972).

[123] Comment, *Love's Labors Lost: New Conceptions of Maternity Leaves*, 7 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 260, 273-77 (1972).

gesting why the Supreme Court did not rely on the equal protection clause. To establish that an equal protection violation has occurred, a court must find that the pregnancy classification discriminates either on the basis of sex or on the basis of differences between disabilities. If sex is found to be a suspect classification, then any classification on that basis is invidious, and a strict standard of review is required. Otherwise, the classification is non-invidious, and the traditional standard of minimal rationality or the more recent standard of strengthened rationality should be applied.

A. *The Characterization of the Discrimination: Sex or Disability?*

If maternity leave rules, which contain a classification on the basis of pregnancy, are found to discriminate on the basis of sex, the recent Supreme Court decisions in *Reed v. Reed*[124] and *Frontiero v. Richardson*[125] indicate that the Supreme Court may be willing to apply to such state action a strict standard of review under the equal protection clause. Thus, governmental subdivisions defending maternity leave policies have naturally argued that the policies do not constitute sex discrimination. They contend, first, that maternity leave policies discriminate only against pregnant women as opposed to all women, and against only a narrow category of pregnant employees as opposed to all non-pregnant employees, both male and female. Merely because *only* women can become pregnant does not mean that all women are discriminated against by pregnancy classification.[126] Second, they argue that this is not an area in which there exists a competitive advantage: (1) only women can become pregnant, thus, there is no competition with men;[127] and (2) male employees receive no special economic advantages as a result of the maternity leave policy.[128] Finally, it is argued that pregnancy is treated differently only because it differs from other disabilities in significant ways: it is voluntary,[129] predictable,[130] and the risks and disabilities of pregnancy are such that women must be forced to leave early because they will not retire of their own volition.[131]

The response to these arguments is generally based on a broad view of the sociological and economic impact of classifications affecting women in their childbearing roles. First, pregnancy is, after all, a sex-linked characteristic, and it does affect almost all women at some time during their lives.[132] The Supreme Court has stated that the fact that some, rather than all, members of one sex are affected does not legitimize an otherwise unlawful discriminatory provision.[133] Besides,

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[124] 404 U.S. 71 (1971).

[125] 411 U.S. 677 (1973).

[126] Petitioner's Brief at 20; *See also*, Comment, *Equal Protection and the Pregnancy Leave Care*, 34 OHIO ST. L.J. 628, 1973) [hereinafter cited Comment].

[127] Cohen v. Chesterfield County School Bd., 474 F.2d 395, 397 (4th Cir. 1973).

[128] *See*, Comment at 650.

[129] *Id.* at 629.

[130] Petitioner's Brief at 12.

[131] Petitioner's Brief at 5-6, 11-12; *see also*, Comment at 648.

[132] Only 15.6% of married women, age twenty and over, are childless. U.S. Dep't of Commerce, Bureau of the Census, Census of the Population 1970, Detailed Characteristics, P.C. (1)-D1-U.S. Summary Table 212, at 41 (1971), cited in Respondent's Brief at 25 n. 11.

[133] Phillips v. Martin-Marietta Corp., 400 U.S. 542 (1971).

discrimination should not be tolerated under the guise of physical properties possessed by one sex.[134] Finally, attitudes toward and treatment of pregnancy are more often a manifestation of cultural sex-role conditioning than a response to medical fact and necessity. In short, they are based on sex-role stereotypes.[135]

Second, it is ludicrous to suggest that women are competing with men in the area of child-bearing. Rather, they are competing as wage and salary earners for seniority, promotions, benefits, and other work-related advantages.[136] Statistically, women do lose a great deal of income due to laws related to their child-bearing roles.[137] Their low level of income as compared to that received by men is due primarily to their erratic work pattern.[138]

Third, pregnancy is not different from other disabilities. Hospitalization, medical treatment, and convalescence occur at the time of childbirth, but unless abnormal, pregnancy is no more disabling than slight obesity, for which no leave is required.[139] Pregnancy will never be wholly voluntary: no birth-control method is fail-safe, and those that fail least often are those most dangerous to their users.[140] To require all women to use birth-control in order to keep a job would

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[134] Sprogis v. United Airlines, Inc., 444 F.2d 1194, 1198 (7th Cir. 1971).

[135] Heath v. Westerville Bd. of Educ., 345 F. Supp. 501, 505 (S.D. Ohio 1972):

> While it may be true that some women are incapacitated by pregnancy and would be well advised to adopt regimens less strenuous than those borne by school teachers, to say this is true of all women is to define that half of our populaton in sterotypical terms and to deal with them artificially.

[136] Respondent's Brief at 25.

[137] Respondent's Brief at 25, citing the testimony of Herbert Stein and Marjorie Whitman of the President's Council of Economic Advisors before the Senate-House Joint Economic Committee, July 10, 1973, pointing to the lack of continuous work experience as an important factor in women's lower salary levels.

[138] During 1972, earnings of full-time, year-round woman workers averaged only 59.5% of men's wages. U.S. Dep't of Commerce, Bureau of the Census, *Money Income in 1971 of Families and Persons in the United States*, Table 56, Current Population Reports. Series P-60, No. 85 (1972), cited in Respondent's Brief at 25.

[139] *Cf.* Parolisi v. Board of Examiners of the City of New York, 55 Misc. 2d 546, 285 N.Y.S.2d 936 (Sup. Ct. 1967) (holding that dismissal of a teacher for obesity was arbitrary since the condition did not impair her ability to teach).

[140] The manufacturers of birth control pills which claim to provide "almost completely effective contraception," advise women not to use them if they have thromboembolic disorders, impaired liver function, suspected carcinoma of the breast, or undiagnosed genital bleeding. Lederle Laboratories, *For Their Peace of Mind and Yours* 6 (August, 1974). Retrospective studies of morbidity and mortality in Great Britain and studies of morbidity in the United States have shown a statistically significant association between thrombophlebitis, pulmonary embodism, and cerebral thrombosis and embolism and the use of oral contraceptives. Royal College of General Practitioners: *Oral Contraception and Thromboembolis Disease*, 13 J. COLL. GEN. PRACT. 267-69 (1967); Inman and Vessey, *Investigation of Deaths from Pulmonary Coronary and Cerebral Thrombosis and Embolism in Women of Child-Bearing Age*, 2 BRIT. MED. J. 193-99 (1968); Vessey and Roll, *Investigation of Relation between Use of Oral Contraceptives and Thromboembolis Disease: A Further Report*, 2 BRIT. MED. J. 651-57 (1969); Sartwell, Mais, Arthea, Greene and Smith, *Thromboembolism and Oral Contraceptives: An Epidemiological Case-Control Study*, 90 AM. J. EPIDEM. 365-80 (1969).

The possible side-effects of birth control pills include swelling, nausea and vomiting, weight gain or loss, darkening of the skin, higher levels of sugar and fatty substances in the blood, irregular vaginal bleeding, loss or increase of body hair, nervous tension, change in sexual appetite, and, most dangerous, blood clots. See Ortho Pharmaceutical Corporation, *After Your Doctor Prescribes Orth-Novum* 2 (1971). These unpleasant side-effects may cause women to choose other, less effective forms of birth control. When these fail, the only alternative to

be to infringe upon their first amendment rights,[141] and upon their right to bear children and, in the end, would ignore the necessity of childbirth for the survival of the human species.[142] On the other hand, many other temporary disabilities and illnesses are voluntarily induced, primarily through the abuse of food, drink, cigarettes, and drugs.[143] The predictability of pregnancy and childbirth makes it easier to plan ahead for substitutes, but, logically, should not thereby require an early unnecessary leave.

Finally, to suggest that pregnant women must be forced to quit early to protect their health, their children's health, and the quality of teaching in the classroom is to imply that pregnant women care less than other teachers about those matters. Such an implication *is* prejudiced. Furthermore, it flies in the face of reality, since pregnant women are under the continual supervision of doctors while others who may not be aware of illness or disability may inadvertently infect children and harm their own health.

The question of whether any of these arguments were heeded by the Court in considering the *LaFleur* case is partly answered in *Geduldig v. Aiello*.[144] In *Aiello*, decided after *LaFleur*, the Court examined the issue of classification of pregnancy again, this time in the equal protection context. Mrs. Aiello was one of several pregnant women who were excluded from California's disability insurance system for private employees. Several of the women had abnormal pregnancies, and during the course of litigation in the state courts, the defendant Department of Human Resources agreed to include abnormal pregnancies under the plan.[145] The Supreme Court decided that exclusion of normal pregnancies from the insurance plan was not invidious discrimination where it related to underinclusiveness of the set of risks the State had elected to insure.[146] The State had also excluded (1) several disabilities created by court order, (2) short-term disabilities (those of less than eight day duration), and (3) disabilities lasting longer than twenty-six days. The Court said that the California legislation did not exclude pregnancy because of gender. Rather, it only excluded one physical condition which is an objectively identifiable physical condition with unique characteristics. The Court reasoned that while it is true that only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex-based classification.[147] Thus, since the Court has held that not all pregnancy classifications are sex-based, it follows that not every pregnancy classification will necessarily be subjected to the same standard of review.

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continuing the pregnancy is abortion, against which many women have religious and moral objections.

[141] *Cf.* Sherbert v. Verner, 374 U.S. 399 (1963) (holding unconstitutional the conditioning of freedom of religion by denial of workmen's compensation to Seventh Day Adventist who refused to take a job which required working on Sunday).

[142] *Cf.* Skinner v. Oklahoma, 316 U.S. 535 (1942) (the right to bear children is fundamental).

[143] Respondent's Brief at 52.

[144] 417 U.S. 484 (1974).

[145] *Id.* at 491.

[146] *Id.* at 494.

[147] *Id.* at 496 n. 20.

B. *The Appropriate Standard of Review of Pregnancy Classifications*

The traditional equal protection test, found in *Lindsley v. National Carbonic Gas Co.*,[148] states that "if any state of facts reasonably can be conceived that would sustain the classification, the existence of that state of facts at the time the law was enacted must be assumed." The school boards in *LaFleur* asked the Court to use this standard of minimal rationality, and to find an adequate basis for the maternity leave rules in their interests in physically capable teachers, in classroom continuity, and in administrative convenience.[149]

The teachers argued that the Court should apply either the strict standard[150] or the *Reed v. Reed*[151] standard of review to the rules. In *Frontiero v. Richardson*, four members of the Supreme Court agreed that classification based on sex should be suspect, as are those based on race, alienage, or national origin.[152] The teachers in *LaFleur* asked that a majority of the Court affirm that such classifications are suspect and that the maternity leave rules contain suspect classifications.[153] These strict standards should also be applied, they argued, because the maternity leave rules penalized the exercise of their fundamental rights to bear children.[154]

If the Court chose not to apply the strict standard, the teachers contended that, at the very least, it should apply *Reed*'s standard of demonstrable rationality,[155] applied by the lower courts in these cases. In *Reed*, the Court held that classifications must be reasonable, not arbitrary, and must rest on some ground of difference having a fair and substantial relation to the object of legislation, so that persons similarly circumstanced are treated alike.[156] There, the Court found that discrimination on the basis of sex in selection of administrators was exactly the kind of arbitrary classification prohibited. In *LaFleur*, the teachers argued that the maternity leave rule was also arbitrary and unrelated to any legitimate interest in the health of the teacher, the continuity of the classroom, or administrative convenience. Furthermore, it was arbitrary because it contained irrebuttable presumptions which were invalid or irrelevant.[157]

In *LaFleur*, the Court made use of portions of these arguments, but did not accept the basic proposition that a suspect classification was involved. However, more recently, in *Aiello*, the Supreme Court indicated when it would be willing to consider pregnancy classifications to be suspect and therefore invidious:

> Absent a showing that distinctions involving pregnancy are mere pretext designed to effect an invidious discrimination against the members of one sex or another, lawmakers are constitutionally free to include or

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148 220 U.S. 61, 78-9 (1911).

149 Petitioner's Brief at 31.

150 *See* Frontiero v. Richardson, 411 U.S. 677 (1973).

151 404 U.S. 71 (1971).

152 411 U.S. 677. The court stated that sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth.

153 Respondent's Brief at 27.

154 *Id.* at 41.

155 404 U.S. 71 (1971).

156 *Id.* at 75-6.

157 Respondent's Brief at 48-51.

> exclude pregnancy from the coverage of legislation such as this on any reasonable basis, just as with respect to any other physical condition.[158]

It is not clear what class of legislation the Court refers to in the phrase "legislation such as this." It may mean insurance plans, or, more broadly, any program for disability or illness (such as sick leave or workmen's compensation), or it may mean *only* plans which also exclude *other* disabilities. The Court clearly intends that the traditional standard of review be applied to such legislation, but the extent of the class may be the subject of much litigation. *Aiello* indicates that the Court will place the burden of proof upon the challenging parties to show that pregnancy classification was intended to be invidious.[159]

Invidious, or malicious, intention is very difficult to prove, however. Maternity leave rules have been defended as part of the beneficent, protective legislation coming out of the women's reform movement of the nineteenth century.[160] In *Kahn v. Shevin*,[161] decided after *LaFleur*, the Court indicated that it would uphold legislation favoring women, if it found that the purpose of the law was to redress unequal economic effects on women.[162] In *Kahn*, a Florida statute which exempted widows from property tax was approved because women were presumed to have lower incomes and more straitened circumstances than other taxpayers.[163]

Maternity leave rules, however, may not have been the product of unadulterated good will toward women. There is some evidence to suggest that such rules are part of an historical pattern of discrimination against female teachers and are based

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[158] 417 U.S. at 496 n. 20.

[159] In *LaFleur*, the Court did not decide what the effect would be on pregnancy leave classifications of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e) (1970), because the act did not apply to state agencies or educational institutions at the time that the school teachers were required to take leave. On March 24, 1972, Title VII was amended to withdraw those exemptions. Pub. L. 92-261, 86 Stat. 103. The Equal Employment Opportunity Commission has since promulgated guidelines providing that a mandatory leave or termination policy for pregnant women presumptively violates Title VII. 29 C.F.R. § 1604.10, 37 Fed. Reg. 6837. Since that time, two courts have found that Title VII was violated where boards of education refused to pay sick leave benefits to women absent for pregnancy and childbirth disabilities. Farkas v. Southwestern School Dist., No. 73-169 (S.D. Ohio, April 9, 1974); Lillo v. Plymouth Bd. of Educ., No. C-73-184-4 (N.D. Ohio, Oct. 3, 1973).

Briefs for *LaFleur* disagreed on the weight to be given these guidelines. *See*, Respondent's Brief at 22 and Petitioner's Brief at 29. Although the Commission's position was not before the *LaFleur* Court, the EEOC fully argued its position in an amicus brief in *Aiello*, asserting that systematic and positive discrimination against women was frequently found in employers' denial of employment opportunity and benefits to women on the basis of the childbearing role, performed solely by women. Brief of the United States Equal Employment Opportunity Commission as amicus curiae at 10, cited in *Aiello*, 417 U.S. 502 n. 6. (Brennan, J. dissenting).

It may be argued that after *Aiello*, women employees may be able to obtain sick leave pay for the disabilities of normal pregnancy and childbirth through the courts only where sick leave programs can be distinguished from the type of risk-insurance program considered in that case. An employee may be more successful, however, in acquiring back pay where she has been required to take leave pursuant to an unconstitutionally arbitrary leave requirement. *See*, Shirley v. Chagrin Falls Bd. of Educ., —— F. Supp. —— (N.D. Ohio 1974).

[160] Comment, *supra* note 126, at 636.

[161] 416 U.S. 351 (1974).

[162] *Id.* at 355.

[163] *Id.* at 353. The dissent by Justice Brennan said that there was not even a reasonable relationship between this classification and the objective of the tax, since only poor widows should be exempted. 416 U.S. at 357-9.

on policies with tainted roots.[164] At the turn of the century, rules were made to prevent the employment of married female teachers,[165] based on fears that schools were being feminized[166] and that the employment of women would discourage the rearing of families.[167] Later, barriers were erected to the employment of women with children and to the retention of pregnant teachers. As a result of economic and judicial pressure,[168] bans against women with children disappeared, but were replaced by mandatory leave policies with early leave and late return dates. The fact that these dates were not often revised in accordance with modern medical opinion and practice suggests that the dates were not primarily designed to insure health or classroom continuity, but instead were intended to keep pregnancy out of sight and mothers at home.[169] Thus, some evidence exists that mandatory leave policies were, and still are, based on invidious discrimination.

IV. CONCLUSION

Although the lower courts found that the maternity leave rules involved an equal protection issue, the Supreme Court eschewed the equal protection clause as the basis for their decision and found due process violations instead. *LaFleur*, along with the two recent cases, *Geduldig v. Aiello* and *Kahn v. Shevin*, suggests that the Court may not be willing to invalidate classifications merely because they are based on sex characteristics. The Court may have found it difficult to accept the concept that classification with regard to pregnancy and childbirth is necessarily a sex-based classification or invidious. The Court also may have feared the future consequences of making such classifications suspect: litigation with respect to "protective legislation" favoring women, to discriminatory rules respecting clothing and hair styles, or to discriminatory employment of persons exhibiting deviant sexual behavior.[170]

The Court's decision on the basis of due process, on the other hand, may

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[164] See Amicus Brief for the National Education Association and the Women's Equity Action League Educational and Legal Defense Fund 3 [hereinafter cited NEA Brief].

[165] NEA Brief at 9 *citing* I. WOODY, A HISTORY OF WOMEN'S EDUCATION IN THE UNITED STATES 509 n. 19 (1966) [hereinafter cited as I. WOODY].

[166] I. WOODY at 513.

[167] NEA Brief at 10 *citing* Snedden, *Personal Problems in Educational Administration: Married Women as Public School Teachers*, 36 TEACHERS COLLEGE RECORD 613, 621 (1935).

[168] *See*, People *ex rel.* Peixotto v. Board of Educ., 82 Misc. 634, 144 N.Y.S. 87 (Sup. Ct. 1913).

[169] NEA Brief at 12 *citing Administrative Practices Affecting Classroom Teachers, Part I: The Selection and Appointment of Teachers*, 10 RESEARCH BULL. 20 n.22 (1932).

[170] *Cf.* Cohen v. Chesterfield County School Bd., 474 F.2d 395 (4th Cir. 1973). Judge Haynsworth had some of the same difficulties in dealing with the concept and expressed his fears of future litigation—some of which have already come to pass:

> We are not accustomed to thinking, as sex classification, of statutes making it a crime for a man forcefully to ravish a woman, or, without force, carnally to know a female child under a certain age. Military regulations requiring all personnel to be clean shaven may be suspect on other grounds, but not because they have no application to females. Prohibition or licensing of prostitution is a patent regulation of sexual activity, the burden of which falls primarily on females, but it has not been thought an invidious sex classification. What of regulations requiring adult women sunning themselves on a public beach to keep their breasts covered? Is that an invidious discrimination based upon sex, a denial of equal protection because the flat and hairy chest of a male lawfully may be exposed?

also result in multitudinous litigation testing legislation containing irrebuttable presumptions not necessarily related to sex discrimination. Finally, the Court's attempt to provide due process for pregnant teachers, while taking into consideration the school boards' interests, has permitted those school boards to use several procedures which could accomplish results similar to the former maternity leave rules. After *LaFleur*, the pregnant teacher may yet be pushed out of the school system for a long maternity leave, and the mother-teacher may continue to find it difficult to return to her classroom.

Barbara A. Maurer

CIVIL PROCEDURE—CLASS ACTION SUITS—CLASS WIDE AWARDS OF BACK PAY IN SUITS UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964. *Johnson v. Goodyear Tire and Rubber Co.*, 491 F.2d 1364 (5th Cir. 1974).

I. INTRODUCTION

The decade since the passage of Title VII of the Civil Rights Act of 1964[1] has seen major growth of substantive rights in the area of equal employment opportunity. Title VII, which prohibits discrimination by employers or unions on the basis of race, color, sex, religion, or national origin,[2] has been interpreted to prohibit discriminatory educational requirements, testing procedures, and seniority provisions,[3] and to provide injunctive and affirmative relief to both individuals and classes.[4] The Civil Rights Acts of 1870 and 1871[5] have been resurrected by the Supreme Court in *Jones v. Alfred H. Mayer Co.*,[6] and can be used to provide relief to victims of discrimination in employment situations not covered by Title

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[1] 42 U.S.C.A. §§ 2000e-2000e-15 (1972) (hereinafter cited as Act), *amending* 42 U.S.C. §§ 2000e-2000e-15 (1964). Johnson's suit was filed in 1967 under the 1964 version of the Act; although the relevant provision appears in the original Act, many of the provisions were carried over into the new Act without substantial change. Therefore citations refer to the latter version of the Act, unless otherwise indicated.

[2] 42 U.S.C.A. § 2000e-2 (1972).

[3] Griggs v. Duke Power Co., 401 U.S. 424 (1970); EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, GUIDELINES ON EMPLOYMENT SELECTION PROCEDURES, 29 C.F.R. §§ 1607.3, 1607.13 (1973).

[4] Robinson v. Lorillard Corp., 444 F.2d 791 (4th Cir.), *cert. dismissed*, 404 U.S. 1006 (1971); Bowe v. Colgate-Palmolive Co., 416 F.2d 711 (7th Cir. 1969).

[5] 42 U.S.C. §§ 1981, 1982 (1971) (originally enacted as part of the Civil Rights Act of April 9, 1866, ch. 31, §§ 1-2, 14 Stat. 27; re-enacted in the Civil Rights Acts of May 31, 1870, ch. 114, § 16, 16 Stat. 144, and April 20, 1871, ch. 22, § 1, 17 Stat. 13). *See* note 6 *infra* for a description of these sections.

[6] 392 U.S. 409 (1968). The Court held that § 1982 applied to acts of racial discrimination in the sale of housing, private activities which were not within the color of any state law. Section 1981, which guarantees the right to make and enforce contracts, was extended by analogy to prohibit private acts of discrimination concerning employment contracts, Sanders v. Dobbs Houses, Inc., 431 F.2d 1097 (5th Cir.), *cert. denied*, 401 U.S. 948 (1970); Boudreaux v. Baton Rouge Marine Contracting Co., 437 F.2d 1011 (5th Cir. 1971).

VII.[7] In addition, a plaintiff can avoid some of the procedural complexities of the Act by bringing an action under the Civil Rights Act.[8]

Johnson v. Goodyear Tire and Rubber Co.[9] illustrates the many facets of discrimination that may be attacked and the broad range of relief available in cases brought under the Act and § 1981 in equal employment opportunity cases.[10] R. L. Johnson, a black employee in the Houston, Texas Goodyear plant, instituted the action on behalf of himself and all other black employees similarly situated. It was undisputed that until 1962, all blacks working for Goodyear were segregated into the Labor Department, the department with the least skilled and lowest paying positions in the plant. Johnson alleged continuing discrimination by Goodyear through its use of testing and educational requirements that had been imposed since 1957 on applicants for all jobs in the plant except those in the Labor Department. Any employee wishing to transfer from the Labor Department had to meet these testing and educational standards, whereas employees hired in other departments before 1957 were free to transfer without meeting them. In addition, the collective bargaining agreement between Goodyear and Local 347 of the International Union of Operating Engineers provided for a seniority system under which an employee forfeited seniority rights if he changed departments.[11] Johnson alleged that this system was another discriminatory measure that effectively restricted blacks to the lowest paying positions. Goodyear had offered several remedial plans to the blacks within the Labor Department,[12] all of which Johnson claimed were inadequate. Johnson sought to enjoin the use of Goodyear's testing and educational requirements and departmental seniority system, and to obtain back pay for himself and the entire class to compensate for economic losses suffered from these discriminatory practices.

Both the district court and court of appeals found evidence of discrimination

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[7] The Act does not apply to employers with fewer than fifteen employees, unions with fewer than fifteen members, employment of aliens outside the United States, or employment of a person for a religious purpose. 42 U.S.C.A. § 2000-e(b), (e) and § 2000e-2 (1972), *amending* 42 U.S.C. § 2000-e(b), (e) and § 2000e-2 (1964).

[8] The provisions of the Act require the filing of charges with the Equal Employment Opportunity Commission (EEOC) within 180 days after the unlawful practice occurred. Here also the requirements were more restrictive under the original Act). 42 U.S.C.A. § 2000e-5(a), (c) (1972), *amending* 42 U.S.C. § 2000e-5(a), (c) (1964).

[9] 491 F.2d 1364 (5th Cir. 1974), *aff'g* 349 F. Supp. 3 (S.D. Tex. 1972).

[10] The remedies under the Act and § 1981 are the same; *see* Sanders v. Dobbs Houses, Inc., 431 F.2d 1097, 1099, n. 6. The court in *Johnson*, however, did not grant relief under § 1981 in this case because it considered notice to the employer of his liability under § 1981 essential before a cause of action could arise. 491 F.2d at 1378-79.

[11] Local 347 was joined as a defendant after it sought an injunction against Goodyear for attempting to expand the seniority rights of its collective bargaining agreement with its black employees.

[12] Goodyear was a government contractor at all times relevant to this suit, and each plan was formulated at the insistence of the Atomic Energy Commission and the Office of Federal Contract Compliance. 491 F.2d 1364 citing Brief for Plaintiffs-Appellants at 8-9. The first Goodyear plan was to allow all employees hired into the Labor Department before 1957 to transfer, providing they had a seventh grade education and could pass the tests. After no minority employee was able to pass the tests, Goodyear offered in 1969 to allow transfer without taking the test. This offer bore few results, due to the loss of seniority rights upon transfer from the Labor Department. Finally, in 1971, Goodyear offered to allow transfer without passing the test, and in addition provided that seniority rights could be transferred. 349 F. Supp. at 9.

from the above facts. The district court enjoined the use of testing and educational requirements for the transfer of black employees hired before 1957, and ordered the creation of a new seniority system for these same employees. It ordered that back pay be given only to Johnson.[13] The court of appeals determined that discrimination had extended to all black employees hired before Goodyear's adoption of an acceptable remedial plan in 1971, and ordered that back pay be awarded to all black employees hired into the Labor Department before 1971 to compensate them for intervening economic loss.[14]

In the first years of enforcement of Title VII the thorny problems of defining and identifying discrimination occupied the courts' attention. The Supreme Court decided many of these issues[15] in *Griggs v. Duke Power Co.*,[16] and the issues which today remain unclear are (1) which types of relief are most appropriate to carry out the purposes of Title VII and § 1981, and (2) which plaintiffs are entitled to such relief. As the court of appeals remarked in *Johnson*, "Title VII litigation is now entering what may properly be termed the 'recovery stage.' "[17] The Act gives the courts a broad range of remedies:

> [T]he court may enjoin the respondent from engaging in such unlawful employment practices, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay . . . or any other equitable relief as the court deems appropriate.[18]

This note will briefly examine the substantive guarantees of Title VII which Goodyear and the union violated and then focus on the use of the class action device and the nature of the monetary relief given. Particular emphasis will be given to the class-wide award of back pay, a remedy which is relatively new.

Although class-wide award of back pay is gaining increased acceptance among the circuits, its scope and general application have not yet been agreed upon.[19] *Johnson* marks the Fifth Circuit's first use of such relief. The court stated that

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[13] 349 F. Supp. at 17-18. The period for Johnson's back pay extended to February 4, 1967, ninety days prior to the filing of the charge of discriminatory practices with the EEOC. This period was determined through a restrictive reading of 42 U.S.C. § 2000e-5(d) (1964), which required that the charge be filed with the EEOC not more than ninety days after the discriminatory practice had been *committed*, not discovered. 349 F. Supp. at 18 n. 8.

[14] Back pay was limited to a two-year period prior to the filing of the complaint, by the court of appeals reading of the Texas two year statute of limitations for back pay relief. 491 F.2d at 1378. The two year limitation is set by the Act as well as in the 1972 amendment. 42 U.S.C.A. § 2000e-5(g) (1972). *See* note 63 *infra* for the court's definition of the class entitled to relief.

[15] This is not to imply that the determination of discrimination is now an easy task: it was to this problem that much of the district court's opinion was devoted, and it formed the basis of several appeals from that opinion. Brief for Plaintiffs-Appellants, Arguments I and II, 349 F. Supp. 3.

[16] 401 U.S. 424 (1971).

[17] 491 F.2d at 1380.

[18] 42 U.S.C.A. § 2000e-5(g) (1972).

[19] It is now established in five circuits and the District of Columbia that affirmative relief may be awarded to members of the class who did not file with the EEOC (*see* note 8 *supra*): Rosen v. Public Service Electric and Gas Co., 477 F.2d 90 (3d Cir. 1973); Moody v. Albemarle Paper Co., 474 F.2d 134 (4th Cir. 1973); Head v. Timken Roller Bearing Co., 486 F.2d 870

> class-wide back pay is available . . . when the aggrieved class has demonstrated cognizable deprivations based on racial discrimination by the employer. . . . As to monetary relief, nothing more is required; nothing less is acceptable.[20]

This new standard for the award of back pay further enhances the power of plaintiffs in class action suits under Title VII. It does raise some very real problems, however, in the use of the class action under rule 23 of the Federal Rules of Civil Procedure with respect to the constitutional rights of the unnamed class members.[21] In addition, it severely limits the traditional discretion of the trial court in fashioning appropriate relief for each situation.[22] Both of these problems point to the need for a revision of the formula for relief promulgated by the court in *Johnson*.

II. SUBSTANTIVE GUARANTEES OF TITLE VII

Title VII's prohibition against discrimination is easiest to enforce in cases of overt discrimination, such as Goodyear's automatic relegation of blacks to the Labor Department prior to 1962.[23] Finding a Title VII violation is more difficult when employment standards are neutral or objective on their face, but still result in the exclusion of all members of a class when applied. Testing and educational requirements and seniority provisions are examples of such "objective standards." These practices were all challenged in *Johnson*. The "anti-preferential" clause of the Act states that an employer may use testing and other qualification procedures so long as they are fairly applied.[24] The problem has been determining when such standards were fairly applied. For example, on a purely statistical basis, requiring a high school diploma excludes a greater proportion of blacks than whites.[25] Other requirements set by employers function in a similar fashion,[26] and the original Equal Employment Opportunity Commission (EEOC)

(6th Cir. 1973); Sprogis v. United Airlines, Inc., 444 F.2d 1194 (7th Cir.), *cert. denied*, 404 U.S. 991 (1971); Watkins v. Washington, 472 F.2d 1373 (D.C. Cir. 1972).

[20] 491 F.2d at 1375. The question of whether the court should award class-wide back pay was specifically reserved in United States v. Georgia Power Co., 474 F.2d 906, 919 n. 16 (5th Cir. 1973).

[21] *See* text at III *infra*.

[22] *See* text at IV A *infra*.

[23] 491 F.2d at 1368-69.

[24] 42 U.S.C.A. § 2000e-2(h) (1972). Thus professionally developed ability tests and bona fide seniority systems are protected. 42 U.S.C.A. § 2000e-2(h) (1972). The EEOC has interpreted "professionally developed" to mean that tests or educational requirements must measure an employee's ability to perform the specific job in question, not to mean that the test was developed by a professional. 29 C.F.R. §§ 1607.1-.14 (1973).

[25] In 1972, 36.4 present of all whites in the United States had high school diplomas, compared to 24.9 percent of all blacks. BUREAU OF CENSUS, U.S. DEPARTMENT OF COMMERCE, STATISTICAL ABSTRACT OF THE U.S. 115 (1973) [hereinafter cited as STATISTICAL ABSTRACT OF THE US.]. The disparity was even greater in the population examined by the court in *Johnson*: in 1960, 39.9 percent of all Texas blacks had high school diplomas, compared to 66.9 percent of Texas whites. 491 F.2d at 1371.

[26] Statistics show a similar variance between blacks and whites in other traditional employment requirements. A qualification of job experience excludes more blacks than whites: the national unemployment rate in 1972 was ten percent of the total black population, compared to five percent of the white population. STATISTICAL ABSTRACT OF THE US 224 (1973). Similarly, in the area of employment testing, blacks as a group score one standard variation

Employment Selection procedures sought to handle such problems by defining discrimination as any procedure which adversely affected employment opportunities of any group protected under Title VII.[27]

The Supreme Court ratified this interpretation of discrimination in *Griggs v. Duke Power Co.*,[28] defining discrimination in terms of consequence rather than motive, and effect rather than intent.[29] Thus, any procedure which screens out a higher percentage of black than white job candidates is discriminatory regardless of intent: statistical evidence of underrepresentation of protected racial groups establishes a prima facie case of discrimination.[30] Once a prima facie case has been made, only by a showing of business necessity will an employer be permitted to continue the discriminatory hiring practice. The employer has the burden of showing an "overriding legitimate business purpose . . . sufficiently compelling to override any racial impact . . . [with] no acceptable alternative policies or practices. . . ."[31]

Post-hiring practices have been held discriminatory as well if they "freeze" the effects of past discrimination. For example, a departmental seniority plan in a company which once had totally segregated departments may operate to prevent promotion of members of a protected class to skilled jobs, and thus constitute discrimination.[32]

III. Maintaining a Class Action Suit Under Title VII

Although the 1964 version of Title VII did not expressly authorize class action suits,[33] courts have generally held such suits permissible under Title VII. The first case fully to consider the issue was *Hall v. Werthan Bag Corp.*,[34] in which a district court held that actions against racial discrimination were, by definition, class suits. The relief granted to the class members was sharply limited in *Hall* by the district court's strict interpretation of the procedural requirements of Title VII: named plaintiffs who had not first filed charges with the EEOC were denied monetary relief and limited to injunctive relief. This pattern of limited relief was followed by other district courts into the early 1970's. The initial reluctance to grant monetary relief to an entire class has been variously ex-

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below whites. Jensen, *How Much Can We Boost IQ and Scholastic Achievement?*, 39 Harv. Educ. Rev. 1, 81-86 (1969).

[27] Equal Employment Opportunity Commission, Guidelines on Employment Selection Procedures, 29 C.F.R. §§ 1607.3, 1607.13 (1973).

[28] 401 U.S. 424 (1970). The Supreme Court in so doing stated that the EEOC Guidelines, as the administrative interpretation of the Act, were entitled to great deference. *Id.* at 433-34.

[29] 401 U.S. at 432.

[30] Rowe v. General Motors Corp., 457 F.2d 348 (5th Cir. 1972).

[31] Robinson v. Lorillard Corp., 444 F.2d 791, 798 (4th Cir.), *cert. dismissed*, 404 U.S. 1006 (1971).

[32] 401 U.S. at 430.

[33] The only provision in the 1964 version of the Act for any type of class action suit allowed the Attorney General to bring an action when he found a pattern or practice of racial discrimination. This responsibility now belongs to EEOC. 42 U.S.C. § 2000e-6 (1964), *as amended*, 42 U.S.C.A. § 2000e-6(c) (1972).

[34] 251 F. Supp. 184 (M.D. Tenn. 1966).

plained by the prohibition of rule 23,[35] the frustration of congressional purpose in Title VII's procedural requirements,[36] the lack of evidence indicating an available job position for every member,[37] the dislike of awarding large sums of money to a class of unnamed plaintiffs,[38] and the difficulty in determining the amount of money to be awarded to each member of the class.[39]

Oatis v. Crown Zellerbach Corp.[40] was the first case to establish guidelines for granting monetary relief to all members of a class. The court set forth two criteria, one demanded by Title VII itself, the other by rule 23.[41] First, the issues in the suit must be those previously raised before the EEOC, and those which the plaintiff has standing to raise. Secondly, the suit must meet the requirements established by rule 23 for class action suits brought in federal courts. Although both criteria are still adhered to in class action suits under Title VII, they are loosely applied and rarely present a barrier for potential plaintiffs. The first requirement was an effort to insure that the purpose of the Act, voluntary conciliation of disputes through the mechanism of the EEOC, was maintained.[42] Today, however, a complaint in federal court is not strictly limited to those issues raised before the EEOC, but may allege any act of discrimination "like or reasonably related to the allegation of the charge and growing out of such allegations."[43]

The second requirement, that of compliance with rule 23, merely recognized a procedural rule which exists independently of Title VII. Rule 23 provides that an action may be brought as a class action if certain enumerated tests are satisfied. Rule 23(a) sets forth the basic criteria for any class,[44] while rule 23(b) imposes additional requirements for various types of actions.[45] Most class suits under Title

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[35] *See, e.g.*, Austin v. Reynolds Metals Co., 327 F. Supp. 1145, 1152-53 (E.D. Va. 1970); *accord* C. WRIGHT, LAW OF FEDERAL COURTS 312 (2d ed. 1970); *see* note 63 *infra*.

[36] 327 F. Supp. at 1153; *see* text at note 43 *infra*.

[37] Franks v. Bowman Transportation Co., 5 F.E.P. Cas. 421 (N.D. Ga. 1972).

[38] Hayes v. Seaboard Coast Line R.R. Co., 46 F.R.D. 49, 53 (S.D. Ga. 1968).

[39] Williams v. American St. Gobain Corp., 1 F.E.P. Cas. 586 (E.D. Okla. 1968), *dismissed*, 2 F.E.P. Cas. 331 (E.D. Okla. 1969), *aff'd* 447 F.2d 561 (10th Cir. 1971).

[40] 398 F.2d 496 (5th Cir. 1968).

[41] *Id.* at 499.

[42] *Id.*

[43] Danner v. Phillips Petroleum Co., 447 F.2d 159 (5th Cir. 1971).

[44] FED. R. CIV. P. 23(a) provides that the prerequisites for a class action are that:
(1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

[45] FED. R. CIV. P. 23(b) provides in pertinent part:
(b) Class Action Maintainable.
An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied and in addition:
(1) the prosecution of separate actions by or against individual members of the class would create a risk of
(A) inconsistent or varying adjudication with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or
(B) adjudications with respect to individual members of the class which should as a practical matter be dispositive of the interest of the other members not parties to the

VII are filed under rule 23(b)(2), which provides that a class action may be maintained when a party has acted or refused to act on grounds generally applicable to the class, so that injunctive or declaratory relief with respect to the entire class is appropriate.

Despite the fact that compliance with rule 23(a) is a prerequisite to the maintenance of a class action suit, courts have often held that a suit complies with rule 23 without examining each requirement.[46] The district court in *Johnson* stated without elaboration that "it appears to this Court that plaintiff has satisfied the requirements of Rule 23(a)."[47] In addition, the court held that the defendant had obviously acted on grounds generally applicable to the class, thereby justifying a suit under rule 23(b)(2). The court of appeals broadened the class to which relief was given, not by re-examining the requirements of rule 23, but by defining discrimination so as to reach a larger group.[48]

To consider racial discrimination suits proper class actions per se and to define the protected class as all black employees whether or not they have been individually affected allows easy access to the courts, but has inherent dangers for both unnamed plaintiffs and the defendant. Rule 23(a) provides procedural protections for both parties to a class action: class members must be represented adequately and fairly and the defendant need only reply to the questions of law or fact common to the class and brought by representative members of that class.[49] Further protection provided in subsections of 23(b) is cued to the relief within each subsection. The usually harmless absence of a notice requirement in rule 23(b)(2), however, leaves a major gap in the protections afforded unnamed plaintiffs in a Title VII class suit, since all members of a rule 23(b)(2) class are bound by the

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adjudication or substantially impair or impede their ability to protect their interest; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. . . .

[46] In addition to the court's handling of *Johnson* at both the district and appellate levels, *see* Oatis v. Crown Zellerbach Corp., 398 F.2d 496 (5th Cir. 1968); Jenkins v. United Gas Corp., 400 F.2d 28 (5th Cir. 1968).

[47] 349 F. Supp. at 12.

[48] 491 F.2d at 1372-73. The court of appeals broadened the class by reference to the statistics on age and education achievement. *See* note 25 *supra*. A generous definition of the class is typical of other courts: in *Jenkins v. United Gas Corp.*, note 46 *supra*, the plaintiff's own suit was moot but he was deemed an adequate representative for other blacks at the plant; in Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122 (5th Cir. 1969), a discharged black was named the representative of all blacks subject to discriminatory practices by the defendant. Courts usually construe the requirements of rule 23 liberally because they have adequate opportunities later in the case to create subclasses, eliminate the class action aspect of the suit, or otherwise modify its initial order. *See* Moss v. Lane Co., 50 F.R.D. 122 (W.D. Va. 1970); Contract Buyers League v. F. & F. Investment, 48 F.R.D. 7 (N.D. Ill. 1969).

[49] One extreme example of a situation in which the defendant was unprepared was presented in Sprogis v. United Airlines, Inc., 444 F.2d 1104 (7th Cir. 1971), in which an airline stewardess was discharged under a no-marriage policy, and won her case for reinstatement and back pay. The district court sua sponte retained jurisdiction to determine if the same relief should apply to other stewardesses, even though no class was defined until after the judgment had been rendered.

decision,[50] and no member of the class may withdraw from the suit. In addition, the 23(b)(2) requirement of action or inaction by the defendant can be satisfied even if the action or inaction affects only one or a few members of the class, provided it is based on grounds which have general application to the class.[51] Further, there is no requirement in 23(b)(2) that common questions of law or fact predominate over individual ones, as they must in a rule 23(b)(3) suit.[52] The *Johnson* court's broadening of the class affected in a Title VII class action suit will not result in the abuse of class members' rights when remedies are confined to the typical 23(b)(2) relief of injunctions or declaratory judgments. But since the relief granted under a Title VII class action suit typically includes monetary awards in addition to injunctions against further discriminatory practices,[53] a lack of notice to members of the plaintiff class may create a situation in which unnamed members may never learn of a settlement or judgment which provides a back pay award to which they are entitled.[54]

This result appears to conflict with rule 23(b)(3)'s purpose of providing adequate protection for the parties concerned.[55] In actions brought under that subsection, plaintiffs must provide all class members with "the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort."[56] The Advisory Committee Notes state that notice is "not merely discretionary," adding that "the mandatory notice . . . is designed to fulfill requirements of due process to which the class action procedure is of course subject."[57] The recent Supreme Court decision in *Eisen v. Carlisle and Jacquelin*[58] confirmed the Committee's reading of the constitutional requirement for notice in rule 23(b)(3) suits,[59] concluding that notice was not discretionary, but "an unambiguous requirement of rule 23."[60] Members of a rule 23(b)(3) class, upon receiving notice, are also entitled to withdraw from the suit if they wish to pursue their own remedies for damages.

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[50] A suit under rule 23(b)(2) does not give members of the class the chance to opt out of the suit; therefore, issues litigated in the case are *res judicata* to all members of the class, 3B J. MOORE, FEDERAL PRACTICE ¶ 23.31[3] (2d ed. 1969).

[51] ADVISORY COMMITTEE, NOTES ON AMENDMENTS TO FEDERAL RULE 23, 39 F.R.D. 98, 102 [hereinafter ADVISORY COMMITTEE].

[52] *Id.*; FED. R. CIV. P. 23(b)(3) is available when the class does not fit within subsections (b)(1) or (b)(2); *see* note 45 *supra* for full text.

[53] *See* text at IV *infra.*

[54] The problems of pretrial notice and notification after the suit could be taken care of by the district court. Rule 23(d) provides that the court has the discretion to order notice to members of the class at any time during the action "for the protection of the members of the class." Further, the actual framing of the relief award could list each discriminatee entitled to back pay if subpoenaed company records were carefully screened. In *Johnson*, however, there is no indication in the district court opinion that such pretrial notice was ordered, although the court of appeals did outline the potential class entitled to back pay. *See* note 63 *infra.*

[55] *See* note 46 *supra.*

[56] ADVISORY COMMITTEE at 106-07.

[57] *Id.*

[58] 417 U.S. 156 (1974).

[59] Although the Supreme Court is construing the requirements of the language of the rule, it examines them in light of the constitutional requirements of Mullane v. Central Hanover Bank and Trust Co., 339 U.S. 306 (1950).

[60] 417 U.S. 156 (1974).

By contrast, actions under rule 23(b)(2) were intended to provide "final relief of an injunctive nature . . . settling the legality of the behavior with respect to the class as a whole."[61] The Advisory Committee saw no need to include a 23(b)(3) requirement of notice to all class members in rule 23(b)(2) suits because such suits do not provide relief to class members as individuals. That is, an injunction requiring a rule 23(b)(2) defendant to refrain from discriminatory practices will presumably change the defendant's behavior toward the entire class, whether or not the unnamed plaintiffs know that a judgment has been entered or even that an action has been brought. Thus lack of notice to individual class members would not jeopardize their subsequent fair treatment pursuant to such an injunction.

The expansion of rule 23(b)(2) remedies to include the monetary relief available under 23(b)(3) without the inclusion of corresponding notice requirements may result in the deprivation of due process, since many of the considerations which make notice a constitutional requirement in a 23(b)(3) suit apply to Title VII suits under rule 23(b)(2) as well. This unique problem posed by Title VII judgments was recognized by Judge Gobold, who stated in *Johnson v. Georgia Highway Express* that "an over-broad framing of a class may be so unfair to the absent members as to approach, if not amount to, a deprivation of due process."[62]

Other procedural problems may arise: barring members who did not receive notice of an original 23(b)(2) action from later suits for back pay would raise due process problems, while attempting to avoid this due process problem by allowing a multiplicity of suits would hinder the rule 23(b)(2) policy of unified disposition of a claim for all members of the class. Thus the practice of allowing back pay awards under rule 23(b)(2) without the requirement of notice places two important policies into potential conflict: the constitutional rights of unnamed plaintiffs and the avoidance of multiple suits resulting from one class action.

In *Johnson v. Goodyear Tire and Rubber Co.* monetary relief was only one of the remedies granted to the members of the class, which potentially included all blacks hired before 1971 at Goodyear's Houston plant.[63] Such back pay relief is now frequently awarded and does provide needed compensation for victims of past discrimination, but courts, concerned with providing full monetary compensation, have not examined the problems involved in dispensing it. *Johnson's* expansion of rule 23(b)(2) remedies to include mandatory back pay awards may provide largely illusory relief unless rule 23(b)(2) is amended to provide for mandatory notice when money damages are claimed. Such notice would also delineate the class to whom the original action was *res judicata*, thus preventing multiple suits.

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[61] ADVISORY COMMITTEE at 102.

[62] Johnson v. Georgia Highway Express, 417 F.2d 1122, 1126 (5th Cir. 1969) (special concurrence).

[63] The court of appeals established an outline of the class involved in the suit when it attempted to set out some preliminary guidelines to aid the district court in fashioning its relief. The court of appeals stated that the initial burden is on the employee to show that he is a member of the recognized class subject to employment discrimination. The court thought that this burden could be fulfilled by a showing of the individual employee that he was hired into the Labor Department before April 22, 1971, and subsequently frozen there due to discriminatory policies of Goodyear. Goodyear could refute this evidence of discrimination only by showing that other factors would have prevented the employee's transfer regardless of any discriminatory employment practices, and such proof must be clear and convincing. 491 F.2d at 1379-80.

IV. Class-Wide Award of Back Pay

A. *The Mandatory Back Pay Requirement*

Johnson states that "where employment discrimination has been clearly demonstrated, employees who have been victims of that discrimination *must* be compensated if financial losses can be established."[64] The Fifth Circuit, therefore, not only states that back pay is an appropriate type of award for a class of victims of past discrimination,[65] but holds that such relief is mandatory to compensate for economic loss. This result is required neither by the Act nor by rule 23(b)(2). The language of the Act leaves the determination of the type of relief within the discretion of the judge; the court "may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate."[66] Monetary relief is not required. Further, the Advisory Committe Notes to rule 23(b)(2) state that "the subdivision does not extend to cases in which the appropriate final relief relates exclusively or predominantly to money damages."[67]

Bowe v. Colgate-Palmolive Co.,[68] the first case to award an entire rule 23(b)(2) class an award of back pay, merely stated that all members of the class were eligible for all forms of relief provided by Title VII.[69] The first attempt to reconcile the language of the Advisory Committee Notes and the practice of the courts in awarding monetary relief in a 23(b)(2) suit occurred in *Robinson v. Lorillard Corp.*,[70] where the award of back pay was seen as only one element of a total equitable relief, rather than a claim for damages, and hence was a part of the relief contemplated by rule 23(b)(2).[71] This rationale has been adopted by other courts in Title VII suits: the award of back pay as compensation for past economic harm, traditionally a legal remedy, has been transformed into an equitable remedy. One recent case went so far as to state that the requirements of rule 23(b)(2) were only that the "conduct of the party opposing the class is such as makes such equitable relief appropriate,"[72] so that the form of equitable relief sought became immaterial to the plaintiff class's qualification to maintain the various kinds of action available under rule 23(b)(2). Hence the "final injunctive relief or corresponding declaratory relief" mentioned by rule 23(b)(2) as appropriate remedies in actions brought under that subsection are not the sole remedies available to plaintiffs, but are only examples of the wide selection of equitable remedies plaintiffs may seek under rule 23(b)(2).

Courts have been influenced in this characterization of back pay awards in Title VII suits as an equitable remedy by the National Labor Relations Act

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[64] 491 F.2d at 1375 (emphasis added).

[65] *See* note 19 *supra.*

[66] 42 U.S.C.A. § 2000e-5(g) (1972).

[67] Advisory Committee at 102.

[68] 416 F.2d 711 (7th Cir. 1969).

[69] *Id.* at 720-21.

[70] 444 F.2d 791 (4th Cir. 1971).

[71] *Id.* at 802. This principle was carried even further in Arkansas Educational Assn. v. Bd. of Education, 446 F.2d 763 (8th Cir. 1971), in which a suit was maintained under rule 23(b)(2) when injunctive relief was no longer necessary due to an intervening change in policy by the defendant, leaving a claim for money damages as the only form of relief sought.

[72] Pettway v. American Cast Iron Pipe Co., 494 F.2d 211, 257 (5th Cir. 1974).

(NLRA).[73] The relief provisions of Title VII were modeled on similar provisions of the NLRA,[74] which states that a party engaged in discrimination should "take such affirmative action including reinstatement of employees, with or without back pay, as will effectuate the policies of this subchapter."[75] Although the wording of the provisions is similar, the framers of the NLRA were guided by considerations inapplicable to Title VII class action suits: back pay may be awarded by the National Labor Relations Board (NLRB) in its administrative proceedings, whereas claims filed with the EEOC must be adjudicated in a federal court before any such award can be made. The NLRA designation of back pay as equitable reflects concern that awards characterized as "damages"[76] would be subject to a trial *de novo* upon appeal from administrative agencies such as the NLRB because of defendant employers' seventh amendment right to jury trial in "suits at common law, where the value of the controversy shall exceed twenty dollars."[77] Hence the framers of the NLRA were guided by the desire to resolve seventh amendment constitutional conflicts, whereas courts faced with Title VII cases should limit their concern to rule 23(b)(2)'s allowance of only certain types of equitable relief. Therefore, despite the derivation of the relief provisions of Title VII from the NLRA, the NLRB's classification of back pay as "equitable" should have no relevance in determining what forms of relief may be granted in class action suits under Title VII.

Besides using language from the NLRA to characterize back pay awards, courts in Title VII class action suits have relied on standards developed in NLRB proceedings to determine the circumstances under which back pay awards may appropriately be granted. The United States Supreme Court, through its study of the legislative history of the NLRA, has concluded that although monetary awards resemble compensation for private injury, such awards are "remedies created by statute [which] vindicate public, not private rights."[78] The Court observed that the award of back pay is not penal and should not be avoided by the Board of Labor in fashioning its relief.[79] Courts hearing appeals from NLRB proceedings have interpreted this holding of the Supreme Court by awarding back pay routinely; "the finding of an unfair labor practice and discriminatory discharge is presumptive proof that some back pay is owed by the employer."[80]

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[73] 29 U.S.C. § 160(c) (1970).

[74] For legislative history on the consideration of Title VII relief based on the NLRB model, see 110 CONG. REC. 6549 (1964). For cases which have recognized the influence of similar NLRB decisions, see United States v. Georgia Power Co., 474 F.2d 906, 921 n. 19 (5th Cir. 1973); 491 F.2d at 1377 n. 37, 1380.

[75] 29 U.S.C. § 160(c) (1970).

[76] *Hearings on S. 1958 Before the Committee on Education and Labor of the Senate*, Statement by Robert Caldwell, 74th Cong. 1st Sess. 445-46 (1935).

[77] When this issue came before the Supreme Court, it stated that the seventh amendment "has no application to cases where the recovery of money damages is an incident to equitable relief even though damages might have been recovered in an action at law. . . ." NLRB v. Jones and Laughlin Steel Corp., 301 U.S. 1, 48 (1937). Moreover, administrative proceedings such as those provided for by the NLRA were unknown at the common law, and therefore did not fall within the seventh amendment. *Id.* at 48-49.

[78] Virginia Electric and Power Co. v. NLRB, 319 U.S. 533, 543 (1943).

[79] *Id.*

[80] NLRB v. Mastro Plastics Corp., 354 F.2d 170, 178 (2d Cir. 1965), *cert. denied*, 384 U.S. 972 (1966).

This interpretation of a back pay award as a public remedy has also been incorporated into Title VII discrimination suits. The Supreme Court spoke of the public nature of suits brought under Title VII of the Civil Rights Act of 1964,[81] and lower courts have read this decision to approve of an NLRB-type interpretation of Title VII.[82] Despite judicial approval of the use of back pay awards, no language in the cases nor the law itself *demands* that the entire class be given back pay as a remedy.

Johnson failed to take into account the unique procedural reasons for the NLRB's characterization of back pay awards as equitable, and thus found in the similarity of the relief provisions of the NLRA and Title VII, and in the NLRB's custom of routinely awarding back pay, a mandate for back pay awards under Title VII. The *Johnson* court fashioned its back pay mandate from several unsound theoretical bases: the definition of back pay as "equitable" injunctive and declaratory relief within the meaning of rule 23(b)(2) was based on the Title VII cases of *Bowe* and *Robinson* and the decisions of the NLRB, and the adoption of a mandatory back pay standard was based on the use of inapplicable NLRB standards.

B. *The Elimination of Previously Successful Title VII Defenses*

The *Johnson* court not only removed the element of judicial discretion from the award of back pay to members of a class, but also eliminated many potential defenses that had been successful before other courts. Goodyear argued that it had made good faith efforts to eliminate effects of past discrimination, and that due to the unsettled state of the law, its actions were not clearly discriminatory at the time they were committed.[83] Both these defenses had been successful before. A district court refused to award back pay in *Baxter v. Savannah Sugar Refining Co.*[84] where the employer had made good faith efforts to eliminate effects of pre-Act segregation. In *United States v. St. Louis-San Francisco Railway Co.*,[85] the Eighth Circuit denied a back pay award, stating that the employer had not acted in bad faith in declining to implement the government's proposed merger of jobs. Similarly, in *United States v. N. L. Industries*,[86] the Eighth Circuit observed, "In this Circuit the law has in regard to back pay not been adequately defined to provide employers and unions with notice that they will be liable for a discriminatee's economic losses due to a continuance of past or present discriminatory policies."[87]

The *Johnson* court rejected both defenses by reference to decisions under the NLRB: "Good faith and detrimental reliance have similarly been rejected as an affirmative defense when balancing the equities in awarding damages in other areas of labor law."[88] The court stated that all employers had been on notice of the

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[81] Newman v. Piggie Park Enterprises, 390 U.S. 400 (1968).

[82] Oatis v. Crown Zellerbach Corp., 398 F.2d 496, 498 (5th Cir. 1968); 491 F.2d at 1377 n. 37.

[83] 491 F.2d at 1374.

[84] 350 F. Supp. 139 (S.D. Ga. 1972).

[85] 464 F.2d 301 (8th Cir. 1972).

[86] 479 F.2d 354 (8th Cir. 1973).

[87] *Id.* at 380.

[88] 491 F.2d at 1377 n. 37. The only possible defense that the *Johnson* court would consider admitting was that the discriminatory practices were in compliance with a "protective"

requirements of Title VII since its effective date in 1965. Goodyear pointed out that the scope of the Title VII mandate was not established until *Griggs*,[89] so that its requirements could not have been known, understood, or compiled with until five years after its effective date. Nevertheless, the court rejected defenses of reliance and good faith, stating that "Title VII is strong medicine and we refuse to vitiate its potency."[90] This rejection of most of the defenses previously available in Title VII suits almost insures that a back pay award must be granted once a prima facie case of discrimination has been established. *Pettway v. American Cast Iron Pipe Co.*,[91] a Fifth Circuit case applying the guidelines of *Johnson*, has carried forward this restrictive interpretation to conclude that discretion to deny back pay is narrow, so that back pay should normally be awarded unless special circumstances are present.[92]

Johnson's guidelines are not in keeping with the traditional role of courts in shaping equitable relief. Courts responsible for creating remedies which take all the peculiar facts of each situation into consideration have previously used wide discretion in fashioning the final relief given.[93] Goodyear's discarded but meritorious defenses, successful in earlier Title VII suits, should be one of those elements which shape the ultimate equitable award. *Johnson* appears to provide, if it does not say explicitly, that the only available alternatives with respect to back pay in Title VII suits are to withhold back pay awards altogether or to award an amount compensating plaintiffs for all economic losses suffered since the effective date of the Act; the Act states that the choice of remedies should be limited only by what provides appropriate relief in each case.[94]

V. CONCLUSION

Title VII was passed in 1964 to eliminate historical patterns of racial discrimination and to provide relief for its victims. The class action suit is one of the most effective methods to gain relief for those entitled to protection under Title VII, in that one member of the class may bring suit for all. In addition, class suits fulfill the public purposes of the Act by ending employment discrimination for all employees of the defendant as well as compensating all aggrieved employees. Back pay is an important element of such relief, the most important remedy which may be given for past years of discrimination and economic loss.

The pattern of awarding back pay as developed by the Fifth Circuit in *Johnson* and other circuits raises two major problems, however. First, rule 23(b)(2) is not designed to provide the relief granted in a typical Title VII suit, but was intended to provide injunctive relief or corresponding declaratory relief: therefore it provides no protections for members of the class as individuals. Even if monetary relief

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state statute. 491 F.2d at 1377. This principle was established in LeBlanc v. Southern Bell Telephone & Telegraph Co., 460 F.2d 1228 (5th Cir.), *cert. denied*, 409 U.S. 990 (1972).

89 401 U.S. 424 (1970).

90 491 F.2d at 1377.

91 494 F.2d 211 (5th Cir. 1974).

92 *Id.* at 252-53.

93 The court of appeals even acknowledged that the trial court's close contact with the parties in the trial gave it a special advantage in fashioning an equitable decree. 491 F.2d at 1380.

94 *See* text at note 18 *supra.*

is labeled a part of total equitable relief rather than damages, such monetary awards nonetheless create a conflict between procedural due process for the plaintiffs and the rule 23 policy of prevention of a multiplicity of suits. Given the prevalence of 23(b)(2) suits filed under Title VII, courts should devote some attention to this conflict. One possible solution would be the filing of the back pay claim separately under rule 23(b)(3). Although such filing would protect potential members of the class through the notice requirements of rule 23(b)(3), it would pose other problems in light of a recent Supreme Court decision on the use of this subsection.[95] The alternative is a special statutory provision for Title VII suits, formulated either within Title VII itself or by a special rule within the Federal Rules of Civil Procedure to provide for mandatory notice in Title VII suits for back pay.[96] The other problem in the granting of monetary damages under Title VII is the continual narrowing of judicial discretion in the fashioning of the equitable relief given. Although this practice is not an infringement of a constitutional right, it does conflict with the traditional power of a judge to take into account all aspects of the case in his final decree. The result of this practice has been to make an award of back pay a foregone conclusion once economic discrimination is shown, despite the fact that the application of the *Griggs* definition of discrimination to acts committed in the five years before its formulation results in harsh judgments against even well-meaning employers. One commentator has stated, "It can, in fact, be accurately observed that Title VII is rapidly becoming another F.E.L.A."[97]

Courts have sought to end employment discrimimination by expanding the right of class action and the relief given. In their provision of full relief to victims of past discrimination, however, they have largely overlooked problems in the methods used. Courts should pause to examine more carefully the principles of class action suits and remedies given before proceeding in the pattern of *Johnson v. Goodyear Tire and Rubber Co.*

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[95] Zahn v. International Paper Co., 414 U.S. 291 (1973) (each member named and unnamed in a rule 23(b)(3) suit must meet the jurisdictional amount); Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974) (each unnamed member of the class whose identity can be ascertained must be notified by mail at the representative plaintiff's expense); Note, *Unnamed Plaintiffs in Federal Class Actions: Zahn v. International Paper Co. Further Restricts the Availability of the Class Suit*, 35 OHIO ST. L.J. 190 (1974).

[96] *E.g.*, a Title VII equivalent to rule 23.1, which governs derivative actions by shareholders.

[97] Gardner, *The Development of the Substantive Principles of Title VII Law: The Defendant's View*, 26 ALA. L. REV. 1, 104 (1973).